Supreme Court, U.S.
FILED

No. 94-763

OCT - 6 1994
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

FIRST NATIONWIDE BANK, A Federal Savings Bank,
A Federal Stock Association,

Petitioner,

vs.

GELT FUNDING CORP., ALLEN I. GROSS, RALPH HERZKA, SHIMON ECKSTEIN, 505 REALTY ASSOCIATES, PROSPECT REALTY ASSOCIATES, JUDAH WOLF, MEIR UNSDORFER, NEW HEIGHTS 765 RIVERSIDE LIMITED PARTNERSHIP, NEW HEIGHTS (765 RIVERSIDE) MANAGEMENT CORP., 1691 EASTBURN REALTY CO., SOL GROSS (a/k/a EUGENE GROSS), JOSEPH FRIEDMAN, 1261 CENTRAL AVENUE OWNERS CORP., 65-11 REALTY CO., AVIEZIER COHEN, ELAINE COHEN, 730 REALTY ASSOCIATES, DAVID MALEK, PETER REBENWURZEL, 36 PLAZA STREET OWNERS CORP., ROBERT WOLF, 350 STERLING ASSOCIATES, EDITH GROSS, BROOKHAVEN REALTY ASSOCIATES, CROWN EQUITIES LIMITED PARTNERSHIP, ADAR TWO REALTY CO., 100 REALTY COMPANY, ESTHER SHUR, E. PHILLIP WEINGARTEN, NEW HEIGHTS (173-174) LIMITED PARTNERSHIP, TEMPLE APARTMENTS MANAGEMENT CORPORATION, 740 REALTY ASSOCIATES, 2344 DAVIDSON ASSOCIATES, JACOB RABINOWITZ, 1958 REALTY ASSOCIATES, MENACHEM HALBERSTAM, MORDECHAI HALBERSTAM, 273 REALTY ASSOCIATES, 2608 REALTY ASSOCIATES, SOLOMON WERDIGER, ESTHER WERDIGER,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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240

QUESTIONS PRESENTED

For the third time since this Court's decision in *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 482 (1985), the United States Court of Appeals for the Second Circuit has invoked "public policy" concerns as the basis for imposing special procedural requisites to the maintenance of claims under the Racketeer Influenced and Corrupt Organizations Act ("RICO"). The effect of the decision in this case is to bar suit under RICO by mortgage lenders alleging a pattern of fraud in connection with mortgage loan transactions.

Relying on two of its own precedents, the Second Circuit ruled that, even when the mortgage lender's RICO claim is that the mortgage loan transactions were induced by fraud, the claim is not ripe, and the lender has no standing to sue, unless it first "has exhausted the bargained for remedies available to it" -- that is, the lender must await default, bring foreclosure proceedings, and await final foreclosure before it may seek damages for the pattern of fraud which induced the loan transactions in the first instance.

Moreover, the court ruled, even if this condition is satisfied, a lender's RICO complaint must still be dismissed at the pleading stage, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, unless its *damages* are alleged with *evidentiary* specificity. In the context of a fraudulently induced mortgage loan, the court held, "no amount of detail" will satisfy this standard because the calculation of the lender's damages depends, to some extent, on the valuation of the mortgaged premises at the time the loan was made -- an exercise the court characterized as essentially "guesswork."

Particularly in light of the ramifications the decision will have for the lending industry, this petition respectfully asks the Court to decide whether the Second Circuit exceeded its

judicial authority by imposing special procedural limitations on the RICO standing of mortgage lenders where:

> (i) such limitations have the same claim-stripping effect as the substantive standing limitations this Court rejected in *Sedima*;
>
> (ii) no court has ever imposed such limitations in the context of an ordinary fraud action; and
>
> (iii) recent amendments to the RICO statute, making "financial institution fraud" a RICO predicate act, clearly express Congressional intent to assure RICO standing to defrauded mortgage lenders.

PARTIES TO THE PROCEEDING

The caption of the case in this Court lists all the parties to the proceeding. The petitioner was plaintiff-appellant below. The respondents were defendants-appellees below.

Pursuant to Rule 29.1 of this Court's rules, the petitioner First Nationwide Bank, a Federal Savings Bank, a Federal Stock Association (now known as Granite Savings Bank), states that it is a wholly-owned subsidiary of Granite Management Corporation, which is a wholly-owned subsidiary of Ford Motor Company.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	iii
TABLE OF AUTHORITIES	vii
OPINIONS BELOW	1
JURISDICTION	1
STATUTES INVOLVED	2
STATEMENT OF THE CASE	2
1. Petitioner	2
2. Respondents	2
3. The Complaint	2
4. The Court of Appeals' Decision	4
REASONS FOR GRANTING THE WRIT	5
I. THE COURT OF APPEALS' DECISION, WHICH ERECTS SPECIAL PROCEDURAL OBSTACLES TO PLEADING A RICO CLAIM, IS IN CONFLICT WITH THIS COURT'S *SEDIMA* DECISION	6
A. The Complaint Alleges Injury Sufficient at Common Law	7
B. The Bank's Claims are Clearly Ripe by Common Law Standards	10

Page

C. The Court's New Requirement that Damages be Pleaded with Evidentiary Precision Makes It Virtually Impossible for a Financial Institution Ever to Sue Under RICO 11

II. THE COURT OF APPEALS' DECISION CONFLICTS WITH CLEAR CONGRESSIONAL INTENT EXPRESSED IN RECENT AMENDMENTS MAKING BANK FRAUD A RICO PREDICATE ACT 14

CONCLUSION 18

APPENDICES A-1

Appendix A: Opinion of the United States Court of Appeals for the Second Circuit (June 9, 1994) (27 F.3d 763) A-1

Appendix B: Order of the United States Court of Appeals for the Second Circuit Denying Petition for Rehearing with a Suggestion for Rehearing In Banc (July 28, 1994) B-1

Appendix C: Opinion of the United States District Court for the Southern District of New York (April 9, 1993) (820 F. Supp. 89) C-1

Appendix D: Amended Complaint D-1

Appendix E: Sections 1961(1) and 1964(c) of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961(1) and 1964(c), and 18 U.S.C. § 1344 ..... E-1

TABLE OF AUTHORITIES

CASES	Page
Bankers Trust Co. v. Rhoades, 859 F.2d 1096 (2d Cir. 1988), *cert. denied*, 490 U.S. 1007 (1989) ..	10, 17
Beres v. Thomson McKinnon Sec., Inc., No. 85-6674, 1989 WL 105967 (S.D.N.Y. Sept. 1, 1989)	14
Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251 *reh'g denied*, 327 U.S. 817 (1946)	14
Broffe v. Horton, 172 F.2d 489 (2d Cir. 1949)	14
Coalition Against Columbus Center v. New York, 769 F. Supp. 478 (S.D.N.Y. 1991), *aff'd in part and rev'd in part on other grounds*, 967 F.2d 764 (2d Cir. 1992)	15
Cosmas v. Hassett, 886 F.2d 8, 11-12 (2d Cir. 1989)	14
Disher v. Information Resources, Inc., 691 F.Supp. 75 (N.D. Ill. 1988), *aff'd*, 873 F.2d 136 (7th Cir. 1989)	7
Federal Deposit Insurance Corporation v. W.R. Grace & Co., 877 F.2d 614 (7th Cir. 1989), *cert. denied*, 494 U.S. 1056 (1990)	9
Garcia v. Gloor, 618 F.2d 264 (5th Cir. 1980), *cert. denied*, 449 U.S. 1113 (1981)	16
Greycas, Inc. v. Proud, 826 F.2d 1560 (7th Cir. 1987), *cert. denied*, 484 U.S. 1043 (1988)	9
In re Cantonwood Assocs. Ltd. Partnership, 138 B.R. 648 (Bankr. D. Mass. 1992)	16

CASES **Page**

In re Washington Assocs., 147 B.R. 827 (E.D.N.Y. 1992) 16

Marbury v. Madison, 1 Cranch 137, 2 L.Ed. 60 (1803) 16

Maxl Sales Co. v. Critiques, Inc., 796 F.2d 1293 (10th Cir. 1986) 16

Sager v. Friedman, 270 N.Y. 472, 1 N.E.2d 971 *reh'g denied*, 271 N.Y. 617, 3 N.E.2d 212 (1936) 7, 8

Sedima, S.P.R.L. v. Imrex Co., 741 F.2d 482 (2d Cir. 1984), *rev'd and remanded*, 473 U.S. 479 (1985) 6, 7, 17

Stochastic Decisions, Inc. v. DiDomenico, 995 F.2d 1158 (2d Cir.), *cert. denied*, 114 S. Ct. 385 (1993) 10

Tennessee Valley Auth. v. Hill, 437 U.S. 153 (1978) .. 16

U.S. v. Chen, 913 F.2d 183 (5th Cir. 1990) 16

Whitbread (US) Holdings, Inc. v. Baron Philippe de Rothschild, S.A., 630 F. Supp. 972 (S.D.N.Y. 1986) 14

STATUTES

Section 1961(1) of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961(1) 2

Section 968 of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub.L. 101-73, 103 Stat. 505 ..... 15, 17

STATUTES **Page**

Section 1964(c) of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1964(c) 2

Title 18, United States Code, Section 1344 15

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner First Nationwide Bank (the "Bank") respectfully requests that a writ of certiorari be issued to review the decision and judgment of the United States Court of Appeals for the Second Circuit, entered on June 9, 1994, which affirmed a final order of the United States District Court for the Southern District of New York, entered April 9, 1993, dismissing the Bank's Amended Complaint (the "Complaint") as a matter of law pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit is reported at 27 F.3d 763 (1994). (Appendix A).[1] The order of the Court of Appeals denying a petition for rehearing with suggestion for rehearing *in banc* is unreported. (App. B). The opinion of the United States District Court for the Southern District of New York is reported at 820 F. Supp. 89 (1992). (App. C).

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on June 9, 1994. (App. A). The Court of Appeals denied a timely petition for rehearing with a suggestion for rehearing *in banc* on July 28, 1994. (App. B). This Court has jurisdiction to review the judgment of the Court of Appeals by writ of certiorari pursuant to 28 U.S.C. § 1254(1).

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[1] All citations in parentheses refer to the appendix filed with this petition for writ of certiorari.

STATUTES INVOLVED

This case applies Section 1964(c) of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1964(c), as well as Section 1961(1) of RICO, 18 U.S.C. § 1961(1), as amended by Section 968 of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"), Pub.L. 101-73, 103 Stat. 505. These provisions are reproduced as Appendix E.

STATEMENT OF THE CASE

1. *Petitioner.* The petitioner is a federal savings bank and federal stock association with its principal place of business in San Francisco, California and with offices in New York City. The petitioner was the plaintiff-appellant below.

2. *Respondents.* The respondents are the Bank's former mortgage broker in New York, the mortgage broker's two officers/principals, and various borrowers and principals of the borrowers, who, acting in complicity with the mortgage broker, fraudulently obtained from the Bank substantial nonrecourse mortgage loans. The respondents were defendants-appellees below.

3. *The Complaint.* The Complaint[2] charges that the defendants made repeated material misrepresentations of facts critical to the Bank's valuation of New York City real properties, which were to serve as the sole collateral for the significant nonrecourse mortgage loans the defendants induced the Bank to make. The Complaint alleges that, as a result of the defendants' intentional material misstatements of fact, the Bank made loans in amounts significantly greater than it would have made on truthful information. The Complaint

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[2] The Complaint is reproduced as Appendix D.

seeks RICO damages in the amount of the difference between what the Bank loaned and the maximum amount it would have loaned had it known the true facts. All of the loans alleged in the Complaint have been defaulted upon.

The principal issue on appeal in the Second Circuit was whether the Bank adequately alleged RICO injury. In that regard, the Complaint alleges that all of the loans the Bank made to defendants were nonrecourse loans. Consequently, the Bank's lending decision depended on certain objective facts about the properties, furnished by the borrowers, from which the Bank would determine how much a property was worth and how much it would be willing to lend against it.

Thus, the Complaint alleges that three objective facts were absolutely critical to the Bank's valuation of the collateral properties: the price at which the borrower was acquiring the property; the rental income generated by the collateral property, set forth on an apartment-by-apartment basis in the borrower's sworn statement of the property's "rent roll"; and the property's operating expenses, set forth in the borrower's verified statement. On the basis of these objective facts, the Bank would determine a property value by applying a standard set of valuation methods. It would then decide, based on that valuation, whether and in what amount to lend by applying fixed percentages to the valuation amount.

The Complaint alleges 30 specific instances where the borrower misrepresented these objective facts. For example, based on contracts the Bank has been able to obtain from sellers of properties and recorded deeds it has obtained from the New York County Clerk, the Complaint alleges numerous occasions in which the borrower misrepresented the purchase price of the collateral by as much as 75 percent of the actual price, causing the Bank to lend much more than its lending standards would have allowed -- indeed, substantially more than the actual purchase price. As a result, borrowers routinely

walked away from the transactions with excess loan proceeds in their pockets.

Likewise, the Complaint alleges "rent roll" fraud based on official rent rolls the Bank obtained for the properties from the New York Department of Housing and Community Renewal ("DHCR"). The Complaint alleges that the borrowers' representations to the Bank concerning rental income were substantially above what the official DHCR reports show. Moreover, for each of the loans identified in the Complaint as involving rent roll fraud, the Complaint specifies precisely what the Bank's valuation of the collateral property would have been applying its standard valuation criteria to the DHCR rent roll figures. It also alleges the maximum amount the Bank would have loaned, based on that valuation, applying its standard lending percentages.

In sum, the Complaint alleges that, as a result of the defendants' fraud, the Bank was misled so that it consistently overvalued collateral properties using its own valuation methods, and loaned defendants substantially more than it would have loaned had it known the true facts about the collateral. Because the collateral properties were not as represented, the value of each lending transaction was, at the time the transaction occurred, substantially less than the Bank believed. Moreover, the Complaint alleges, all 30 loans have been defaulted upon and the present value of the collateral properties, as alleged by reference to appraisals performed on each, is not adequate to cover the Bank's losses stemming from the fraud.

4. *The Court of Appeals' Decision.* The Second Circuit ruled that the Complaint failed to state a RICO claim. In so holding, the court devised a number of procedural requisites to standing, which it ruled the Bank had not satisfied.

With respect to 20 loans alleged in the Complaint that had not been finally foreclosed as of the date the Complaint was

filed, the Second Circuit ruled that the Bank's RICO claim is not ripe because the Bank's injury will not be fully ascertainable, and its damages not "clear and definite," until the properties are sold. According to the court:

> Because the fraud defendant is not liable for all losses that may occur, but only for those actually suffered, only after the lender has exhausted the bargained for remedies available to it can the lender assert that it was damaged by the fraud, and then only to the extent of the deficiency.

27 F.3d at 768 (App. at A-9).

With respect to the remaining 10 loans alleged, which have been finally foreclosed, sold or restructured, the Court ruled that the Complaint does not adequately allege proximate cause; however, while cast in terms of proximate cause, the court's holding actually was that the Complaint's damages allegations were deficient. The court held that, because of "the complexity of the New York real estate market, and the fact that [the Bank's] losses came in the wake of a downturn in the real estate market," the Bank had to plead its *damages* with particularity. 27 F.3d at 770. (App. at A-14, A-15). The court found the Bank's attempt to meet this burden defective. It ruled as a matter of law, without any record support, that the official public records the Bank relied on for its valuation allegations were "unreliable."

REASONS FOR GRANTING THE WRIT

The Second Circuit's decision is unprecedented and will have drastic repercussions in the lending industry. The sweeping proposition that a defrauded mortgage lender is stuck with its nonrecourse bargain and confined to its contractual remedies against the collateral, even where the contract was induced by fraud, is contrary to long-settled principles of

tort law and squarely at odds with decisions of the Seventh Circuit that were discussed in appellant's briefs in the Second Circuit, but not addressed in the court's Opinion. Moreover, the Second Circuit's new requirement that damages be pleaded with particularity will make it virtually impossible for a defrauded mortgage lender to bring a RICO claim even after it gets past the first prerequisite of the court's decision.

I. THE COURT OF APPEALS' DECISION, WHICH ERECTS SPECIAL PROCEDURAL OBSTACLES TO PLEADING A RICO CLAIM, IS IN CONFLICT WITH THIS COURT'S *SEDIMA* DECISION.

In *Sedima, S.P.R.L. v. Imrex Co.*, 741 F.2d 482 (2d Cir. 1984), *rev'd and remanded*, 473 U.S. 479 (1985), the Second Circuit sought to narrow the application of RICO based on what it perceived to be an increasing divergence between the statute's original purpose and its widening application. To effectuate its goal, the court construed RICO to permit private actions only where there existed a "racketeering injury" -- a special injury "different in kind from that occurring as a result of predicate acts themselves, or not simply caused by predicate acts, but also caused by an activity which RICO was designed to deter." 741 F.2d at 496. This Court reversed, finding "no room in the statutory language for an additional, amorphous 'racketeering injury' requirement." 473 U.S. at 495. Although sharing some of the Second Circuit's concerns regarding the use of RICO by civil plaintiffs, the Court concluded that the statute's problems were primarily the result of its broadly drafted provisions and that the efforts of the Second Circuit to cure these deficiencies were "a form of statutory amendment" not properly undertaken by the courts. *Id.* at 500.

In this case, the procedural requisites to RICO standing the Second Circuit has imposed have the very same effect as the substantive limitations it sought to impose in *Sedima*.

A. The Complaint Alleges Injury Sufficient at Common Law.

The Complaint alleges that the Bank has suffered fraud losses on the defaulted loans in the amount of the difference between what the Bank actually loaned and the maximum amount it would have loaned had it known the true facts about the collateral. This, we respectfully submit, constitutes classic out-of-pocket loss ordinarily recoverable in a common law fraud action. *See, e.g., Disher v. Information Resources, Inc.*, 691 F.Supp. 75, 79 (N.D. Ill. 1988), *aff'd*, 873 F.2d 136 (7th Cir. 1989). Indeed, as the New York Court of Appeals ruled in the context of a loan transaction, "the injury is the inducement to make a contract which otherwise would not have been made, and the measure of damages is indemnity for loss suffered through that inducement." *Sager v. Friedman*, 270 N.Y. 472, 481, 1 N.E.2d 971, 974, *reh'g denied*, 271 N.Y. 617, 3 N.E.2d 212 (1936). That loss is measured by

> the difference between the value of the bargain which a plaintiff was induced by fraud to make and the amount or value of the consideration exacted as the price of the bargain.

Id., 270 N.Y. at 481, 1 N.E.2d at 974. In this case, the "value of the consideration exacted" is the amount the Bank actually loaned, and the true "value of the bargain" is the amount the Bank would have loaned on truthful information.

The Second Circuit's holding that the Bank's RICO claim is not ripe is rooted in the tort law damages principle that "any amounts paid on the debt reduce the amount the plaintiff can claim as damages resulting from the fraud." 27 F.3d at

768 (citations omitted) (App. at A-9). From this principle, and without further analysis, the court concluded: "Thus, the amount of loss cannot be established until it is finally determined whether the collateral is insufficient to make the plaintiff whole, and if so, by how much." *Id.* (citation omitted). While the Bank does not dispute that its damages will be subject to reduction at trial to the extent the collateral is sufficient to cover its fraud losses, the proposition that the Bank cannot state a RICO claim until those offsets are made certain in foreclosure is completely novel and wholly unwarranted.

The only common law case the court cited as support for its decision is *Sager v. Friedman, supra*; however, contrary to the court's reading of that decision, *Sager* did *not* hold that the collateral securing a loan had to be foreclosed before a suit for fraud could be brought. Quite the contrary, the court held that where a loan was secured *both* by collateral and a guaranty, proof that the lender actually suffered damages from the fraud depended upon showing not only that the collateral was inadequate, but that the note could not be collected by suit against a solvent guarantor. As the court observed, "in this record there is no suggestion that the guarantor Cohen is not solvent." *Id.*, 270 N.Y. at 482, 1 N.E.2d at 974. Had there been such proof, however, there is no doubt that plaintiff would have satisfied its burden of proving damages without any requirement that he first foreclose the collateral and sue on the guaranty. Indeed, while the case came before the court after trial, in passing on the sufficiency of the complaint, the court squarely ruled that it contained "allegations of fact sufficient to constitute a cause of action at law for fraud." *Id.* at 477-78, 1 N.E.2d at 972.

As a matter of pleading, therefore, since the Complaint in this case alleges, based on appraised values of the collateral, that such collateral is not adequate to cover the Bank's losses, and it alleges that the Bank has no other contractual source to

pursue for its money, it alleges a claim sufficient under the common law.

In *Federal Deposit Insurance Corporation v. W.R. Grace & Co.*, 877 F.2d 614 (7th Cir. 1989), *cert. denied*, 494 U.S. 1056 (1990), the plaintiff made a $75 million nonrecourse loan to the defendant, secured by three natural gas fields in Mississippi. In evaluating the loan, the lender's engineer assessed two of the three fields as sufficient to support the loan, but he nonetheless had doubts about making such a large loan on the strength of only that security. Accordingly, the lender demanded that the third field be included as part of the security as a cushion in case the first two fields turned out to be less productive than expected, or the price of natural gas fell. Some time after that, but before the loan closed, the borrower discovered that the third field was worthless; however, it did not disclose this fact to the lender, which made the loan in the $75 million amount.

As a threshold matter, the court observed that the nondisclosure was certainly material to the lender. *Id.*, 877 F.2d at 619. The court had no difficulty finding that a cognizable cause of action had been stated, ultimately concluding that the proper measure of the plaintiff's loss in the circumstances was the difference between the principal and interest it would have obtained from an alternative use of the $75 million, and the present (or actual) value of the loan plus any interest plaintiff had received as of the date of trial. *Id.* at 623.

Significantly, the properties were still operating and "productive" as of the date of the appeal and, therefore, the possibility still existed that the loan might be repaid out of the property; nonetheless, the court held that the lender was entitled to immediate fraud recovery in an amount reflecting the present value of the loan taking into account the "unlikelihood that it will actually be repaid". *Id.; see also Greycas, Inc. v. Proud*, 826 F.2d 1560 (7th Cir. 1987), *cert. denied*, 484 U.S. 1043 (1988).

This result is also eminently fair in this case since all of the loans alleged in the Complaint have been defaulted upon; therefore, the Bank clearly has the right to foreclose on the collateral and whether or not it does so now is a business judgment as to which the Bank bears all of the risk.

B. The Bank's Claims are Clearly Ripe by Common Law Standards.

With respect to the 20 unforeclosed loans alleged in the Complaint, the Court of Appeals held the Bank's claims premature for an additional reason. Relying on its own prior precedent to the effect that a cause of action under RICO does not accrue until the amount of damages becomes "clear and definite," the court ruled that "a plaintiff who claims that a debt is uncollectible because of the defendant's conduct can only pursue the RICO treble damages remedy after his contractual rights to payment have been frustrated." 27 F.3d at 768 (citation omitted) (App. at A-10).

The principal authorities cited in support of this "ripeness" holding are two Second Circuit decisions in cases involving so-called "lost debt" claims -- *Bankers Trust Co. v. Rhoades*, 859 F.2d 1096 (2d Cir. 1988), *cert. denied*, 490 U.S. 1007 (1989), and *Stochastic Decisions, Inc. v. DiDomenico*, 995 F.2d 1158 (2d Cir.), *cert. denied*, 114 S. Ct. 385 (1993). In those two cases, the claim was that defendants had successfully thwarted plaintiffs' efforts to collect debts. While fraud was one means by which the defendants attempted to evade collection, the essential element of the allegations in both actions was that the debts were uncollectible, not simply that the defendants had perpetrated fraud. The Second Circuit ruled that since uncollectibility was the essential element of a lost debt claim, a cause of action would not exist, and could not accrue, "until it is established that collection of the [debts] has been successfully frustrated." *Stochastic*, 995 F.2d at 1166.

Since collection efforts were still ongoing, the court held the RICO claims premature.

Whether or not these cases were correctly decided, their holding and supporting rationale do not apply outside the very narrow context of a "lost debt" claim, where an essential element is proof of uncollectibility. No decision prior to this one has imposed such a requirement in the ordinary fraud context.

The fraud alleged in the Complaint in this case was complete the moment the fraud was perpetrated. At that point, the Bank parted with its money. Moreover, since the Complaint further alleges that the collateral is not now -- and never was -- adequate to make the Bank whole, its injury is definite whether or not the collateral is ever sold. At most, foreclosure is but one means of making the damage amount certain; damages can be made just as certain by resort to appraisal evidence. There is simply no basis to thwart the common law rule and impose a foreclosure prerequisite to the maintenance of a RICO claim in cases such as this.

C. The Court's New Requirement that Damages be Pleaded with Evidentiary Precision Makes it Virtually Impossible for a Financial Institution Ever to Sue Under RICO.

With respect to the 10 loans alleged in the Complaint that had been finally foreclosed, sold or restructured, the Second Circuit held that the Complaint failed to allege "proximate cause," but its holding was, in fact, that damages were not adequately alleged. Although the Complaint alleges injury based on the significant differences between what the Bank loaned and the maximum amount it would have loaned had it known the true facts, the court ruled, as a matter of law, that damages could not be ascertained with sufficient certainty because the Complaint's allegations concerning the amounts the Bank would have loaned are based on the property values the

Bank would have assigned to the collateral had it known the true facts. The court reasoned that any such "estimate" of value necessarily involves a "substantial amount of guesswork about how both present and future conditions will impact on the market." 27 F.3d at 770 (App. at A-15). It held that the Bank was therefore required to allege "with particularity" a factual basis to support its valuation methods. It then decided that the Bank had not met this pleading burden. The court concluded: "The guesswork and inconsistencies in determining the magnitude of the alleged misrepresentations highlight the difficulties of proving damages in this case with a reasonable degree of certainty." 27 F.3d at 771 (App. at A-16).

The Bank respectfully submits that the decision of the Second Circuit will make it virtually impossible for any mortgage lender ever to assert a viable RICO claim. All mortgage lending invariably depends on the lender's estimation of a property's worth based on objective data submitted by the borrower. Consequently, any estimate of damage from fraud necessarily requires the lender to calculate the amount it would have loaned by first determining the property value it would have arrived at had it known the true facts. Since that exercise merely involves applying the lender's own standard property valuation formulas to what it now knows to be the true facts, there is no guesswork involved in the damage calculation. As long as the same formulas in effect at the time the loan was made are applied in the same way and to the same variety of objective facts, a lender can determine to a virtual certainty the amount it would have loaned had the borrower provided truthful information.

That is what the Complaint alleges in this case: the maximum amounts the Bank would have loaned using the very same valuation formulas and lending standards the Bank used when it made the loans. Consequently, the Complaint's

allegations of loss stemming directly from the fraud could not be more precise.

To support its result, the Second Circuit applied an unprecedented level of scrutiny to the Complaint's damages allegations, a much higher level of scrutiny than Rule 9(b) -- even if it applied -- has ever been held to require. For example, the court questioned the reliability of the Bank's allegations of rent roll fraud, which were based on a comparison of defendants' representations with the official DHCR rent rolls for the relevant time periods. Although that comparison showed striking discrepancies, the court inexplicably ruled, without any record support, that the DHCR rent rolls "often understate rental incomes and thus would understate property values, in some cases by a significant amount." 27 F.3d at 771 (App. at A-15). On that basis, the court concluded: "Since the Bank's [income] figures were lower than the actual [income], its estimate of the amount of the fraud damages must to some extent be artificially high." *Id.* The court therefore simply rejected the allegations because, in the court's view, they were not sufficient to allow a determination of "the actual degree of discrepancy." *Id.*

The court also criticized the "amount" of damages the Complaint alleges because it includes "contractual charges and penalties that are not generally recoverable under RICO." *Id.* (App. at A-15, A-16). And it further castigated the Complaint's "methodology" on the ground that it "does not adequately account for the contribution of external factors to the loss," namely, the general real estate market decline in New York City. *Id.* (App. at A-16). The Bank respectfully submits that the latter point is clearly incorrect. To the extent the Bank loaned more than it would have loaned, the Bank's damages are, by definition, exclusive of any loss experienced by the collateral as a result of a market decline.

The notion that the "amount" of damages must be pleaded with specificity is inconsistent with the usual rule that the amount of damages is an issue reserved for trial. It is also incompatible with the well-settled damages principle that, at trial, "the wrongdoer shall bear the risk of the uncertainty which his own wrong has created." *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 265, *reh'g denied*, 327 U.S. 817 (1946); *see also Broffe v. Horton*, 172 F.2d 489, 495 (2d Cir. 1949).

Neither Rule 9(b) nor any other recognized rule of pleading has ever been construed to require that damages be pleaded with particularity, let alone with the level of evidentiary specificity the Second Circuit required. On the contrary, Rule 9(b) is generally recognized to apply only to the allegations of time, place, speaker and content of the alleged misrepresentations. *Accord Cosmas v. Hassett*, 886 F.2d 8, 11-12 (2d Cir. 1989). With respect to damages, on the other hand, it has always been enough to allege that defendants' fraud caused plaintiff to pay more than it otherwise would have paid. *See Whitbread (US) Holdings, Inc. v. Baron Philippe de Rothschild, S.A.*, 630 F. Supp. 972, 978-79 (S.D.N.Y. 1986); *Beres v. Thomson McKinnon Sec., Inc.*, No. 85-6674, 1989 WL 105967 at *11 (S.D.N.Y. Sept. 1, 1989).

II. THE COURT OF APPEALS' DECISION CONFLICTS WITH CLEAR CONGRESSIONAL INTENT EXPRESSED IN RECENT AMENDMENTS MAKING BANK FRAUD A RICO PREDICATE ACT.

The various procedural devices the Second Circuit employed to uphold the dismissal of the Bank's Complaint effectively combine to eliminate RICO as a remedy for financial institutions alleging fraud in mortgage loan transactions. Even if the lender satisfies the condition precedent the court has imposed, the novel requirement that damages be pleaded

with virtual evidentiary certainty is one which, the court itself conceded, is not likely ever to be met. Indeed, the Complaint's allegations of fraud and consequential damages are based on recorded deeds, rent roll figures compiled by the DHCR (a state agency), and the actual contracts entered into between the borrowers and the sellers of the collateral properties. Each of these sources would appear to be unassailable in regard to both their accuracy and objectivity. In fact, it is difficult to imagine other sources of potentially greater accuracy and objectivity. Nonetheless, the Court of Appeals rejected the Bank's approach -- on the pleadings. It held that "no amount of detail" can save this Complaint -- a holding that is nothing short of incredible. 27 F.3d at 772 (App. at A-17).

In the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"), Pub.L. 101-73, 103 Stat. 183, Congress amended RICO specifically to include bank fraud as a predicate act. Specifically, Congress included conduct proscribed by Section 1344 of Title 18 in the list of RICO predicate acts. Section 1344 states broadly that it is a crime to "knowingly execute[], or attempt[] to execute, a scheme or artifice -- (1) to defraud a financial institution; or (2) to obtain any moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses." The conduct alleged in the Complaint in this case clearly falls within these parameters.

It is a well-settled principle of constitutional law that the role of the courts is "to enforce Congress' will as formulated in legislation." *Coalition Against Columbus Center v. New York*, 769 F. Supp. 478, 490 (S.D.N.Y. 1991), *aff'd in part and rev'd in part on other grounds*, 967 F.2d 764 (2d Cir. 1992) (citations omitted). Nonetheless, the Second Circuit's decision in this case most clearly was driven by a policy concern (of questionable validity in these circumstances) that applying RICO in all but a narrow fashion would be

" 'encouraging everyone who suffers an investment loss because of an unanticipated change in market conditions to pick through [loan applications] with a fine-tooth comb in the hope of uncovering misrepresentations.' " 27 F.3d 772 (App. at A-18, A-19).

While the court may have identified some legitimate concerns regarding RICO in general and actions predicated on bank fraud in particular, "[b]road policy considerations cannot override specific statutory provisions." *In re Washington Assocs.*, 147 B.R. 827, 832 (E.D.N.Y. 1992) (citing *In re Cantonwood Assocs. Ltd. Partnership*, 138 B.R. 648 (Bankr. D. Mass. 1992)). This is particularly so where the statutory provision at issue is unambiguous. *See, e.g., Maxl Sales Co. v. Critiques, Inc.*, 796 F.2d 1293, 1297 (10th Cir. 1986) (citation omitted) (". . . where statutes are plain and unambiguous, court must give effect to the intention of the legislature as expressed rather than determine what the law should or should not be"); *U.S. v. Chen*, 913 F.2d 183, 189 (5th Cir. 1990) (quoting *Garcia v. Gloor*, 618 F.2d 264, 268 (5th Cir. 1980), *cert. denied*, 449 U.S. 1113 (1981)) (courts must " 'start with [the statute's] plain words without pausing to consider whether a statute differently framed would yield results more consistent with fairness and reason.' "). In this instance, the Court of Appeals has clearly exceeded its authority because "[w]hile '[i]t is emphatically the province and duty of the judicial department to say what the law is,' it is equally - and emphatically - the exclusive province of the Congress . . . to formulate legislative policies. . . ." *Tennessee Valley Auth. v. Hill*, 437 U.S. 153 (1978) (quoting *Marbury v. Madison*, 1 Cranch 137, 2 L.Ed. 60 (1803)).

Moreover, the consequences of the Court of Appeals' decision are broad in scope. New York is the nation's commercial center, especially in regard to banking. The Southern District of New York and the Second Circuit are therefore the primary federal courts responsible for interpreting and

applying the laws of banking. *See Bankers Trust, supra.* Consequently, the decision in this case will have drastic and pervasive repercussions nationwide.

In sum, there is no justification for the procedural obstacles to suit imposed by the Court of Appeals in this case, which effectively bar the filing of RICO actions by mortgage lenders based on acts of fraud, especially those occurring during the period of the late 1980s -- the very period which inspired passage of FIRREA. The decision of the Court of Appeals has essentially repealed FIRREA's amendment to RICO and, as such, as in *Sedima*, is a form of statutory amendment not properly undertaken by the courts.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Dated: New York, New York
October 26, 1994

Respectfully submitted,

DONOVAN LEISURE NEWTON
& IRVINE

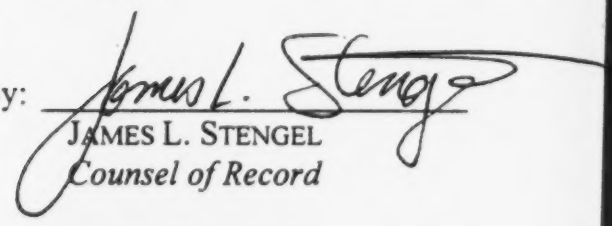
By: 
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EXHIBIT 1

FIRST NATIONWIDE BANK, A Federal Savings Bank, A Federal Stock Association, Plaintiff-Appellant,

v.

GELT FUNDING CORP., Allen I. Gross, Ralph Herzka, Shimon Eckstein, 505 Realty Associates, Prospect Realty Associates, Judah Wolf, Meir Unsdorfer, New Heights 765 Riverside Limited Partnership, New Heights (765 Riverside) Management Corp., 1691 Eastburn Realty Co., Sol Gross (a/k/a Eugene Gross), Joseph Friedman, 1261 Central Avenue Owners Corp., 65-11 Realty Co., Aviezier Cohen, Elaine Cohen, 730 Realty Associates, David Malek, Peter Rebenwurzel, 36 Plaza Street Owners Corp., Robert Wolf, 350 Sterling Associates, Edith Gross, Brookhaven Realty Associates, Crown Equities Limited Partnership, Adar Two Realty Co., 100 Realty Company, Esther Shur, E. Phillip Weingarten, New Heights (173-174) Limited Partnership, Temple Apartments Management Corporation, 740 Realty Associates, 2344 Davidson Associates, Jacob Rabinowitz, 1958 Realty Associates, Menachem Halberstam, Mordechai Halberstam, 273 Realty Associates, 2608 Realty Associates, Solomon Werdiger, Esther Werdiger, Defendants-Appellees.

No. 457, Docket 93-7422.

James L. Stengel, New York City (Andrew M. Calamari, Jodi E. Freid, Deanna R. Waldron, Donovan, Leisure, Newton & Irvine, New York City, Roger B. Mead, Folger & Levin, San Francisco, CA, of counsel), for plaintiff-appellant.

Lewis R. Clayton, New York City (Mark A. Silberman, Paul, Weiss, Rifkind, Wharton & Garrison, of counsel), for defendants-appellees Gelt Funding Corp., Allen I. Gross, Sol Gross a/k/a Eugene Gross, 350 Sterling Associates, Edith

Gross, Brookhaven Realty Associates, 2608 Realty Associates, Solomon Werdiger, and Esther Werdiger.

Nathan Lewin, New York City (Miller, Cassidy, Larroca & Lewin, Washington, D.C., Sara Moss, Howard, Darby & Levin, New York City, of counsel), for defendant-appellee Ralph Herzka.

Edward D. Fagan, New York City (Fagan & Associates, New York City, of counsel), for defendants-appellees Shimon Eckstein and 505 Realty Associates.

Rosenfeld & Maidenbaum, Cedarhurst, NY (Meir Rosenfeld, New York City, of counsel), for defendant-appellee Judah Wolf.

Robin Feingold Singer, New York City (Kramer, Levin, Naftalis, Nessen, Kamin & Frankel, of counsel), for defendants-appellees New Heights 765 Riverside Ltd. Partnership, New Heights 765 Riverside Management Corp., New Heights (173-174) Ltd. Partnership, Temple Apartments Management Corp. and Crown Equities Ltd. Partnership.

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Sheldon Rudoff, New York City (Goodkind, Labaton Rudoff & Sucharow, Mark S. Arisohn, James W. Johnson, of counsel), for defendants-appellees 730 Realty Associates, David Malek, Peter Rebenwurzel, Adar Two Realty Co., 740 Realty Associates, and 2344 Davidson Associates.

Before: MAHONEY and WALKER, Circuit Judges, and METZNER, District Judge.*

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* Hon. Charles M. Metzner, United States District Judge for the Southern District of New York, sitting by designation.

WALKER, Circuit Judge:

This appeal raises issues surrounding the requirements for pleading a private civil cause of action under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962(c) and (d). Principal among these is whether, where the predicate to the RICO claim is fraud by a borrower in misrepresenting the value of collateral, the fraud is complete before any actual loss is realized because the lender incurs additional concealed risk. Plaintiff-appellant First Nationwide Bank ("FNB" or the "Bank") appeals from a judgment of the United States District Court for the Southern District of New York (Michael B. Mukasey, *Judge*), dismissing its complaint for failure to state a claim upon which relief can be granted. *See* Fed.R.Civ.P. 12(b)(6). In its amended complaint, FNB alleges that the defendants misrepresented the value of properties pledged as collateral to secure nonrecourse loans, and thereby fraudulently induced FNB to make loans it otherwise would not have made. FNB claims that it was damaged in an amount equal to the fraudulently induced portion of the loans. The amended complaint contains two counts under RICO, 18 U.S.C. § 1962(c) and (d), and seven pendent state law claims.

The district court concluded that FNB had not sufficiently alleged: (1) that it suffered an injury cognizable under RICO; (2) that the alleged fraud proximately caused FNB's loss; or (3) that the eighteen borrowers named as defendants were part of a RICO enterprise. The court thus dismissed the RICO counts of the amended complaint, and absent a substantial federal question, the pendent state law claims as well. Because we agree that FNB has not adequately plead injury and proximate cause, we affirm.

BACKGROUND

We review *de novo* the district court's dismissal under Rule 12(b)(6), taking as true the factual allegations in the complaint, and drawing all reasonable inferences therefrom in

FNB's favor. *Ferran v. Town of Nassau,* 11 F.3d 21, 22 (2d Cir.1993).

FNB is a federal stock association based in San Francisco, California with offices in New York City. Prior to 1985, FNB's business consisted primarily of making purchase money mortgage loans to individuals. In 1985, FNB's parent corporation, First Nationwide Financial Corp., was purchased by Ford Motor Company. In May of that year, FNB began a significant expansion of its lending activities in New York by offering nonrecourse mortgage loans to owners and purchasers of commercial properties, principally multi-unit apartment buildings. Over the next five years FNB made over 1,000 nonrecourse loans to commercial property investors in the New York Metropolitan area in an aggregate amount of approximately $1.3 billion. In November 1990, in the midst of a severe downturn in the New York real estate market, FNB phased out its commercial lending business and stopped making commercial loans through its New York office.

Defendant Gelt Funding Corp. ("Gelt Funding") is a commercial mortgage broker that represents owners and potential buyers of commercial property, and helps them obtain financing for their transactions. Defendants Allen I. Gross and Ralph Herzka are Gelt Funding's principals: Gross its president and principal or sole shareholder, Herzka an officer and employee. Between 1985 and 1990, Gross and Herzka cultivated a lucrative relationship with FNB on Gelt Funding's behalf in which Gelt Funding served as mortgage broker for borrowers of about $900 million in loans comprising roughly seventy percent of FNB's commercial mortgage portfolio. Eighteen of those borrowers are alleged to have supplied fraudulent information in their loan applications and are named as defendants in this action. The remaining individual defendants are alleged to be partners in, or otherwise affiliated with, one or more of the defendant borrowers.

FNB made all the loans in question on a nonrecourse basis. In a nonrecourse loan transaction, the lender gives up its right to sue the borrower personally upon default, and is confined to recourse against the collateral property. Because the lender's remedy upon default is limited to the value of the property, that value is critical to the lender's decision whether to make the loan. Accordingly, before making a loan, FNB required borrowers to supply information about the property's operating income; the price for which the property was to be purchased; sale prices for the property in the previous three years; and whether the borrower intended to encumber the property with additional debt. FNB ordinarily would not make a nonrecourse loan unless the collateral property's net operating income was at least 1.05 times greater than the combination of principal and interest due on the loan, and the property value exceeded the loan amount by at least twenty-five percent.

During an audit of its commercial loan portfolio in 1991, FNB determined that a higher proportion of loans brokered by Gelt Funding had defaulted compared to other loans. In January 1992, FNB filed its original complaint in nine counts consisting of two RICO counts and seven state common-law claims. The first RICO count was brought against Gross, Herzka, and Gelt Funding (collectively, the "Gelt Defendants"). The second RICO count named, in addition to the Gelt Defendants, all the borrower entities and affiliated individuals (the "Borrower Defendants") who allegedly operated as a single organization, the so-called "Borrower Enterprise." The remaining seven state law counts alleged fraud, conspiracy to defraud, negligent misrepresentation, conversion, conspiracy to convert, unjust enrichment, and breach of fiduciary duty.

In its complaint, FNB alleged that Gross and Herzka used Gelt Funding to obtain nonrecourse loans by misrepresenting information pertinent to FNB's lending decision. Specifically, FNB claimed that Gross and Herzka intentionally misstated the operating income of the properties and concealed both the

borrowers' intention to use the property to secure additional debt and the fact that artificial sales transactions were used to overstate property values. The complaint also alleged that FNB was led to believe that the borrowers and Gelt Funding were independent entities, when in fact Gross, Herzka, and a small group of undisclosed principals controlled most of the borrower entities.

Judge Mukasey dismissed FNB's original complaint without prejudice primarily on the ground that FNB had not adequately alleged two essential elements of a RICO claim—injury and proximate causation—because there were no specific allegations concerning the magnitude of the alleged misrepresentations or whether there was a causal connection between those misrepresentations and FNB's loss. *First Nationwide Bank v. Gelt Funding, Inc.*, No. 92 Civ. 0790 (MBM), 1992 WL 358759 (S.D.N.Y. Nov. 30, 1992). FNB then filed an amended complaint which set out in detail the current status of thirty allegedly fraud-tainted loans. FNB claimed that the thirty loans were representative of other fraudulent loans that FNB eventually would aver and prove at trial. For each of the thirty loans, FNB stated the original loan amount, the outstanding balance, the current market value of the property, and the amount of loss FNB attributed to the defendants' alleged fraud as opposed to declines in the real estate market.

The amended complaint relied on two injury theories to support the damages element of FNB's claims. First, FNB claimed that because the value of the collateral properties was overstated, FNB loaned more than it would have if it had known the true value, and was therefore undersecured for the additional amounts (the "Excess Loan Loss"). In calculating the Excess Loan Loss, FNB estimated the true value of the collateral properties at the time the loans were made, the amount FNB would have loaned if it had known the true value, and the loss it claims it would have sustained if it had not loaned the greater amount in reliance on the defendants'

representations. By subtracting this estimated loss from the actual loss FNB claims it sustained on the loans, FNB arrived at its Excess Loan Loss. Second, FNB asserted that upon discovering the alleged fraud in 1991 it was required to restrict its use of additional assets to adhere to the federally mandated level of capital reserves. This, FNB claims, necessarily reduced the income it otherwise would have earned if it had loaned out the restricted funds (the "Excess Reserve Loss"). FNB includes this lost income as a consequential damage from the alleged fraud.

The district court again dismissed FNB's complaint. *First Nationwide Bank v. Gelt Funding, Corp.*, 820 F.Supp. 89 (S.D.N.Y. 1993). Upon careful review, Judge Mukasey found FNB's additional fact allegations and injury theories still insufficient to overcome the deficiencies found in the first complaint; namely, the failure to allege RICO injury and proximate cause. Moreover, the district court held that FNB's second RICO count was incomplete because FNB did not sufficiently allege that all the named defendants constituted a RICO "enterprise." This appeal followed.

DISCUSSION

On appeal, FNB continues to press the injury and proximate cause issues raised in the district court. We hold that to the extent FNB's complaint is predicated on loans that have not been foreclosed, its claims are not ripe for adjudication because it is uncertain whether FNB will sustain any injury cognizable under RICO. Furthermore, even where FNB relies on loans that have been foreclosed, its complaint still must be dismissed because, as Judge Mukasey correctly concluded, the complaint does not adequately allege proximate cause.

RICO Standing

In examining FNB's standing to assert its RICO claims, we begin, as we must, with the language of the statute. The private civil cause of action under RICO provides that:

> Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

18 U.S.C. § 1964(c). From this language, courts have extracted the conditions a plaintiff must meet to satisfy RICO's standing requirements: "(1) a violation of section 1962; (2) injury to business or property; and (3) causation of the injury by the violation." *Hecht v. Commerce Clearing House, Inc.*, 897 F.2d 21, 23 (2d Cir.1990). Most important for purposes of this appeal are the two elements relied on by the district court in dismissing FNB's complaint, injury and causation.

I. Injury

FNB contends that its claims with respect to all fraudulent loans were "ripe" for suit the moment the loans were made, regardless of whether the borrowers presently were in default or whether FNB completed efforts to foreclose on the collateral properties. FNB asserts that although several of the loans in the amended complaint have not been sold, foreclosed, or restructured, FNB has standing to assert a RICO claim with respect to those loans, as well as other similar loans FNB might discover in the future. We find FNB's hypothesis that it may assert a RICO claim based on unforeclosed loans to be inconsistent with this circuit's precedent governing RICO standing and insufficient to support an allegation of injury under RICO.

A. The Measure of Fraud Damages

Under its Excess Loan Loss theory, FNB would classify all excess amounts loaned as fraud damages, recoverable even if the borrower repaid the loan in full with interest. FNB argues that any amounts recovered through foreclosure on the

collateral properties would be applied in mitigation of damages, and are irrelevant to the determination of whether FNB has been or will be injured. According to FNB, it suffered immediate quantifiable injury when the loans were made because the loans were undersecured, FNB assumed additional risk of loss, and "[f]or all practical purposes, the[] additional funds were lost the moment the loans were made." We find this argument unpersuasive.

The general rule of fraud damages is that the defrauded plaintiff may recover out-of-pocket losses caused by the fraud. *See Disher v. Information Resources, Inc.*, 691 F.Supp. 75, 79 (N.D.Ill.1988), *aff'd*, 873 F.2d 136 (7th Cir.1989). In this case, the damages issue arises in the specific context of a fraudulently induced loan. In such cases, although the loan is procured through fraud, any amounts paid on the debt reduce the amount the plaintiff can claim as damages resulting from the fraud. *See Hermes v. Title Guarantee & Trust Co.*, 282 N.Y. 88, 93, 24 N.E.2d 859, 861 (1939); *Sager v. Friedman*, 270 N.Y. 472, 480-81, 1 N.E.2d 971, 973-74 (1936). Thus, the amount of loss cannot be established until it is finally determined whether the collateral is insufficient to make the plaintiff whole, and if so, by how much. *Sager*, 270 N.Y. at 482, 1 N.E.2d at 974 ("[T]he value of the stock...deposited as collateral for the loan, and the value it would have had if the defendants' representations as to the financial condition of that company had been true, furnishes no measure of any loss suffered by the plaintiff through wrongful inducement to make the loan.").

In determining fraud damages, any amount recovered by the fraudulently induced lender necessarily reduces the damages that can be claimed as a result of the fraud. Because the fraud defendant is not liable for all losses that may occur, but only for those actually suffered, only after the lender has exhausted the bargained-for remedies available to it can the lender assert that it was damaged by the fraud, and then only to the extent of the deficiency. FNB does not allege actual

injury by simply claiming that it incurred additional risk of loss as a consequence of the fraud. *See Berg v. First State Ins. Co.*, 915 F.2d 460, 464-65 (9th Cir.1990) (rejecting corporate directors' claim that they suffered injury when insurance policies protecting them against risk of loss from shareholder derivative suit were cancelled, even though suit resulted in no award against them). Thus, we reject FNB's novel theory that it was damaged simply by being undersecured when, with respect to those loans not yet foreclosed, the actual damages it will suffer, if any, are yet to be determined.

B. The Ripeness of FNB's RICO Injury

The rule of fraud damages described above has been adopted by this court in the context of deciding whether a defrauded plaintiff has standing under RICO. A RICO plaintiff "only has standing if, and can only recover to the extent that, he has been injured in his business or property by the conduct constituting the violation." *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496, 105 S.Ct. 3275, 3285, 87 L.Ed.2d 346 (1985); *see Hecht*, 897 F.2d at 23. Furthermore, as a general rule, a cause of action does not accrue under RICO until the amount of damages becomes clear and definite. *See Bankers Trust Co. v. Rhoades*, 859 F.2d 1096, 1106 (2d Cir.1988), *cert. denied*, 490 U.S. 1007, 109 S.Ct. 1642, 104 L.Ed.2d 158 (1989). Thus, a plaintiff who claims that a debt is uncollectible because of the defendant's conduct can only pursue the RICO treble damages remedy after his contractual rights to payment have been frustrated. *See Stochastic Decisions, Inc. v. DiDomenico*, 995 F.2d 1158, 1166 (2d Cir.), *cert. denied*, —— U.S. ——, 114 S.Ct. 385, 126 L.Ed.2d 334 (1993).

For example, in *Stochastic Decisions* the plaintiff, a judgment creditor of a bankrupt company, brought a RICO action claiming that the company fraudulently conveyed assets to prevent the plaintiff from collecting on several judgments. We held that to the extent plaintiff successfully collected on the judgments, those amounts would reduce the

RICO injury *pro tanto,* before any trebling occurred. *Id.* at 1165-66. Because plaintiff's collection efforts were ongoing and the actual amount of its injury was indefinite and unprovable, plaintiff did not yet have standing under RICO.

Similarly, in *Commercial Union Assurance Co. plc v. Milken,* 17 F.3d 608 (2d Cir.1994), RICO plaintiffs argued that they were "entitled to a trebling of their damage award *before* any offset through settlements, restitution, recoupment or otherwise." *Id.* at 612. The plaintiffs maintained that they were fraudulently induced into investing approximately $10.5 million, none of which had been recouped when they initiated suit, and that they were entitled to trebling of this sum even though the entire amount subsequently was repaid with interest. Citing *Stochastic Decisions,* we rejected this claim and held that to the extent the plaintiffs received the return actually bargained for, they had suffered no compensable RICO injury. *Id.*

In this case, the loss FNB would suffer as to those loans FNB has not finally foreclosed cannot yet be determined. Only when FNB's actual loss becomes clear and definite will the claims be ripe for suit. Until that time, FNB lacks standing under RICO to assert claims as to those loans.

II. Proximate Cause.

Even with respect to those loans that have been finally foreclosed, FNB's complaint suffers from the equally fundamental defect of not adequately alleging proximate cause. RICO provides a civil remedy only to those persons injured "by reason of " the defendant's predicate acts. To show that an injury resulted "by reason of " the defendant's action, and therefore to have standing under RICO, the plaintiff must allege "that the defendant's violations were a proximate cause of the plaintiff's injury, i.e., that there was a direct relationship between the plaintiff's injury and the defendant's injurious conduct." *Standardbred Owners Ass'n v. Roosevelt Raceway Assocs., L.P.,* 985 F.2d 102, 104 (2d Cir.1993). This

requires a showing not only that the defendant's alleged RICO violation was the "but-for" or cause-in-fact of his injury, but also that the violation was the legal or proximate cause. *Holmes v. Securities Investor Protection Corp.*, —— U.S. ——, —— - ——, 112 S.Ct. 1311, 1316-18, 117 L.Ed.2d 532 (1992); *Standardbred Owners,* 985 F.2d at 104; *Hecht,* 897 F.2d at 23.

In the context of predicate acts grounded in fraud, the proximate cause requirement means that the plaintiff must prove both transaction and loss causation. *Citibank, N.A. v. K-H Corp.*, 968 F.2d 1489, 1495 (2d Cir.1992); *Bastian v. Petren Resources Corp.*, 892 F.2d 680, 684 (7th Cir.), *cert. denied,* 496 U.S. 906, 110 S.Ct. 2590, 110 L.Ed.2d 270 (1990). Thus, in addition to showing that but for the defendant's misrepresentations the transaction would not have come about, the defendant must also show that the misstatements were the reason the transaction turned out to be a losing one. *K-H Corp.*, 968 F.2d at 1495; *Bastian,* 892 F.2d at 684. Furthermore, when factors other than the defendant's fraud are an intervening direct cause of a plaintiff's injury, that same injury cannot be said to have occurred by reason of the defendant's actions. *See Brandenburg v. Seidel,* 859 F.2d 1179, 1190 (4th Cir.1988).

The purpose of the proximate cause requirement is to fix a legal limit on a person's responsibility, even for wrongful acts. *See Holmes,* —— U.S. at ——, 112 S.Ct. at 1318; *Sperber v. Boesky,* 849 F.2d 60, 63 (2d Cir.1988). Central to the notion of proximate cause is the idea that a person is not liable to all those who may have been injured by his conduct, but only to those with respect to whom his acts were "a substantial factor in the sequence of responsible causation," and whose injury was "reasonably foreseeable or anticipated as a natural consequence." *Hecht,* 897 F.2d at 23-24. Although we are mindful of the admonition that RICO is to be liberally construed, the foregoing holds true in a RICO setting because proximate cause, a common law concept, exists independently

of the statute. *See Sperber,* 849 F.2d at 60; *Brandenburg,* 859 F.2d at 1189 n. 11.

Many considerations enter into the proximate cause inquiry including "the foreseeability of the particular injury, the intervention of other independent causes, and the factual directness of the causal connection." *Brandenburg,* 859 F.2d at 1189. We have recognized that the proximate cause determination "is not free from normative legal policy considerations," *Hecht,* 897 F.2d at 23, and indeed involves a judgment based upon " 'some social idea of justice or policy.' " *Sperber,* 849 F.2d at 63 (quoting W.P. Keeton, D. Dobbs, R. Keeton, D. Owen, *Prosser and Keeton on the Law of Torts* 264 (5th ed. 1984)). The key reasons for requiring direct causation include avoiding unworkable difficulties in ascertaining what amount of the plaintiff's injury was caused by the defendant's wrongful action as opposed to other external factors, and in apportioning damages between causes. *See Holmes,* —— U.S. at ——, 112 S.Ct. at 1320. Although the likelihood that the injury would result from the wrongful conduct is a consideration, the rule often has as much to do with problems of proof as with foreseeability. *See Imagineering, Inc. v. Kiewit Pac. Co.,* 976 F.2d 1303, 1312 (9th Cir.1992), *cert. denied,* —— U.S. ——, 113 S.Ct. 1644, 123 L.Ed.2d 266 (1993); *Sperber,* 849 F.2d at 65-66.

In examining the issue of whether the defendants' alleged fraud was the proximate cause of FNB's injuries, Judge Mukasey articulated a three-part test:

> [A] borrower who misstates the value of loan property or its rental income proximately causes injury to a bank when (1) the misrepresented value of the property was substantially above its actual value at the time of the misrepresentation, (2) the injury was sustained soon after the misrepresentation, and (3) external factors did not contribute to the injury.

1992 WL 358759, at *5. While these factors do not constitute an exhaustive list of the considerations that go into the proximate cause calculus, they do provide a useful guide for evaluating the sufficiency of FNB's proximate cause allegations. In determining whether the required directness is present in the context of a fraudulently induced loan, important considerations are the magnitude of the misrepresentations, the amount of time between the loan transaction and the loss, and the certainty with which the loss can be attributed to the defendant's conduct. With these precepts in mind, we turn to the question of whether FNB adequately pleaded proximate cause.

A. Magnitude of the Overstatements

At the outset, we are unable to tell accurately whether the alleged misrepresentations "substantially" overstated the value of the collateral properties because FNB's complaint provides no reliable measure of the alleged misrepresentations. The district court dismissed FNB's original complaint because in pleading causation it failed to provide any "order of magnitude" for the misrepresentations to support FNB's assertion that they were material. The court concluded that "[t]he bald assertion that misrepresentations were material is not a fact."

In response, FNB's amended complaint provides, for each of the thirty representative loans, a schedule purporting to set out the approximate amount by which the defendants overstated the property values. The value and profitability of multi-unit apartment complexes in New York, however, depend upon many factors that influence the general real estate market including changes in rent control laws, property taxes, vacancy rates, the level of city services provided, and increased operating expenses including electric and heating oil prices. Given the complexity of the New York real estate market, and the fact that FNB's losses came in the wake of a downturn in the real estate market, FNB must allege loss

causation with sufficient particularity such that we can determine whether the factual basis for its claim, if proven, could support an inference of proximate cause. *See Finkel v. Stratton Corp.*, 754 F.Supp. 318, 330 (S.D.N.Y.1990). FNB's attempt to meet this burden suffers from several defects.

First, as with any estimate, the result of a property appraisal is only as reliable as the information used and the manner in which it is employed to approximate the factors that influence property values in the real world. Given the number of variables that can influence real estate values, an estimate necessarily involves a substantial amount of guesswork about how both present and future conditions will impact on the market, making it difficult to construct a reliable model. *Cf.* Collins, *A Question of Value,* 51 Mortgage Banking 33 (July 1991).

Second, FNB's task is made more difficult since it is attempting to reconstruct the value of the collateral properties at the time the loans were made, without accurate information regarding many of the variables that would go into that calculation. For instance, FNB's calculation of the "actual," as opposed to represented, property values when the loans were made, relies in turn on another estimate of the property's "true" net operating income ("NOI") at that time. *See* Amended Complaint ¶ 70. The Bank's NOI estimate was based on rent roll figures compiled by the New York Department of Housing and Community Renewal ("DHCR"), which often understate rental incomes and thus would understate property values, in some cases by a significant amount. Since the Bank's NOI figures were lower than the actual NOI, its estimate of the amount of fraud damages must to some extent be artificially high. Unfortunately, the same problems that hinder FNB in trying to estimate these figures also prevent us from determining the actual degree of discrepancy.

In addition, the amount of damages FNB claims to have suffered from the defaults is distorted because it includes

contractual charges and penalties that are not generally recoverable under RICO as damages caused by the fraud. *See Sager*, 270 N.Y. at 481, 1 N.E.2d at 974 (damages for fraud do not include benefit of contractual bargain). For example, with respect to one loan made in December 1985, FNB claims that it loaned $485,000 based on a represented property value of $850,000, whereas if it knew the property was worth only $260,000 (according to FNB's *post hoc* estimate), it would have loaned only $170,000. Despite the fact that the loan was paid for six years without default, FNB alleges that the amount due on the $485,000 loan in December 1991 was approximately $551,000 including penalties and charges.

It is also apparent that FNB's methodology does not adequately account for the contribution of external market factors to the loss. For instance, with respect to the loan previously mentioned, FNB claims that the property value according to its latest appraisal is $400,000, fifty-three percent higher than its purported value of $260,000 in 1985. FNB advances this position despite the fact of a general decline in the real estate market during which other collateral properties, by FNB's own account, lost fifty percent of their value or more. It is also noteworthy that despite the fact that most of the properties listed in the complaint are alleged to have suffered a significant decline in market value since the loans were made, with respect to only three loans does FNB attribute any of its own loss to market decline.

The guesswork and inconsistencies in determining the magnitude of the alleged misrepresentations highlights the difficulty of proving damages in this case with a reasonable degree of certainty. Nor is FNB's complaint rescued by the principle that in deciding a Rule 12(b)(6) motion all reasonable inferences must be drawn in FNB's favor. Under Rule 12(b)(6), "the well-pleaded material allegations of the complaint are taken as admitted; but conclusions of law or unwarranted deductions of fact are not admitted." 2A Moore & Lucas, *Moore's Federal Practice* ¶ 12.08, at 2266-69 (2d ed.

1984); *see Fleming v. Lind-Waldock & Co.*, 922 F.2d 20, 23-24 (1st Cir.1990). This principle applies with even greater force in a fraud case governed by the more stringent pleading requirements of Fed.R.Civ.P. 9(b). *See O'Brien v. National Property Analysts Partners*, 936 F.2d 674, 676-77 (2d Cir.1991); *McCoy v. Goldberg*, 748 F.Supp. 146, 155 (S.D.N.Y.1990). The amended complaint does allege that FNB's "losses are not the result of any general decline in the real estate market." Amended Complaint ¶ 67. However, this conclusory statement is based on FNB's faulty damages theories and its unsupported claims regarding the "actual" value of the collateral properties when the loans were made. *See id.* In the absence of a factual basis underlying FNB's causation claim, we cannot accept its allegation as fact. *See Shields v. Citytrust Bancorp, Inc.*, 25 F.3d 1124, 1129 (2d Cir. 1994) (dismissing fraud complaint where facts alleged did not support inference that defendants knew "continuing erosion of the real estate market would render the loan portfolio precarious"); *Shemtob v. Shearson, Hammill & Co.*, 448 F.2d 442, 445 (2d Cir.1971) (conclusory allegation of fraud insufficient where facts alleged did not support inference thereof); *see also Kadar Corp. v. Milbury*, 549 F.2d 230, 233 (1st Cir.1977) ("[C]ourts do 'not accept conclusory allegations on the legal effect of the events plaintiff has set out if these allegations do not reasonably follow from his description of what happened....'") (quoting Wright & Miller, *Federal Practice and Procedure: Civil* § 1357).

The methodology employed by FNB in determining the magnitude of the defendants' alleged overstatements of income is so defective, and the conclusions reached so defy logic, that no "reasonable inferences" can be drawn therefrom. No amount of detail can save FNB's complaint when the detail is based on flawed and unreasonable methodologies that lead to unsupported conclusions.

B. Temporal Connection and Intervening Factors

Even if we were to accept FNB's questionable methodology for alleging the magnitude of the defendants' alleged fraud, the complaint still falls short of pleading proximate cause because FNB's alleged injury was insufficiently close in time to the alleged misrepresentations to warrant the inference of a nexus between the two. The second and third factors relied on by Judge Mukasey, dealing with the time lapse between the alleged fraud and the plaintiff's injury and the presence of external factors, are related. When a significant period of time has elapsed between the defendant's actions and the plaintiff's injury, there is a greater likelihood that the loss is attributable to events occurring in the interim. Similarly, when the plaintiff's loss coincides with a marketwide phenomenon causing comparable losses to other investors, the prospect that the plaintiff's loss was caused by the fraud decreases. *Bastian,* 892 F.2d at 684.

In this case, the substantial period between the alleged fraud and FNB's loss, coupled with the concurrence of that loss with the real estate market crash, is additional support for the conclusion that the fraud was not a substantial cause of FNB's injury. Despite FNB's allegation that the net operating income for most of the collateral properties was insufficient to service the principal and interest payments due on the loans, few of the properties went into default until mid-1990, when the real estate market collapsed. We agree with the district court that the five year interval between the bank's losses and the defendants' alleged misrepresentations strongly suggests that external factors were a substantial cause of those losses.

As noted above, the proximate cause determination necessarily involves a component of policy. *See Hecht,* 897 F.2d at 23. Here, "[n]o social purpose would be served by encouraging everyone who suffers an investment loss because of an unanticipated change in market conditions to pick through [loan applications] with a fine-tooth comb in the hope of

uncovering a misrepresentation." *Bastian,* 892 F.2d at 685. As in *Bastian,* FNB may "have alleged the cause of [its] entering into the transaction in which [it] lost money" but it has not alleged "the cause of the transaction's turning out to be a losing one." *Id.* at 684. FNB's claims fail because it has not adequately plead facts which, if proven, would show that its loss was caused by the alleged misstatements as opposed to intervening events.

We do not mean to suggest that in all cases a fraud plaintiff will be unable to plead proximate cause when the claim follows a market collapse. In this case, it is the cumulative effect of the considerations discussed above, rather than any single factor, that compels our decision.

CONCLUSION

With respect to those loans not foreclosed, FNB has not alleged an injury ripe for suit under RICO. As to those and the other loans enumerated in the complaint, proximate cause has not been adequately alleged. Accordingly, the judgment of the district court is affirmed.

EXHIBIT 2

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 28th day of July one thousand nine hundred and ninety-four.

FIRST NATIONWIDE BANK, A Federal Savings Bank, A Federal Stock Association,

Plaintiff-Appellant,

-v-

GELT FUNDING CORP., ALLEN I. GROSS, RALPH HERZKA, SHIMON ECKSTEIN, 505 REALTY ASSOCIATES, PROSPECT REALTY ASSOCIATES, JUDAH WOLF, MEIR UNSDORFER, NEW HEIGHTS 765 RIVERSIDE LIMITED PARTNERSHIP, NEW HEIGHTS (765 RIVERSIDE) MANAGEMENT CORP., 1691 EASTBURN REALTY CO., SOL GROSS (a/k/a EUGENE GROSS), JOSEPH FRIEDMAN, 1261 CENTRAL AVENUE OWNERS CORP., 65-11 REALTY CO., AVIEZIER COHEN, ELAINE COHEN, 730 REALTY ASSOCIATES, DAVID MALEK, PETER REBENWURZEL, 36 PLAZA STREET OWNERS CORP., ROBERT WOLF, 350 STERLING ASSOCIATES, EDITH GROSS, BROOKHAVEN REALTY ASSOCIATES, CROWN EQUITIES LIMITED PARTNERSHIP, ADAR TWO REALTY CO., 100 REALTY COMPANY, ESTHER SHUR, E. PHILLIP WEINGARTEN, NEW HEIGHTS (173-174) LIMITED PARTNERSHIP,

TEMPLE APARTMENTS MANAGEMENT CORPORATION, 740 REALTY ASSOCIATES, 2344 DAVIDSON ASSOCIATES, JACOB RABINOWITZ, 1958 REALTY ASSOCIATES, MENACHEM HALBERSTAM, MORDECHAI HALBERSTAM, 273 REALTY ASSOCIATES, 2608 REALTY ASSOCIATES, SOLOMON WERDIGER, ESTHER WERDIGER,

Defendants-Appellees.

DOCKET No. 93-7422

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by **First Nationwide Bank, A Federal Savings Bank, A Federal Stock Association, Plaintiff-Appellant.**

Upon consideration by the panel that decided the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT,
GEORGE LANGE III, Clerk
By:

/s/ Carolyn Clark Campbell

Carolyn Clark Campbell
Chief Deputy Clerk

C-1

EXHIBIT 3

FIRST NATIONWIDE BANK, a Federal Savings Bank, a federal stock association, Plaintiff,

v.

GELT FUNDING, CORP., et al., Defendants.

No. 92 Civ. 0790 (MBM).

United States District Court,
S.D. New York.

April 9, 1993.

OPINION AND ORDER

MUKASEY, District Judge.

Plaintiff First Nationwide Bank sues defendants Gelt Funding Corp., et al., under RICO, 18 U.S.C. § 1962, and state law. Plaintiff alleges that defendants fraudulently misrepresented the value of commercial properties and induced it to make non-recourse loans secured by those properties. In a previous opinion, familiarity with which is assumed, this Court granted defendants' motion to dismiss plaintiff's complaint for failure to state a claim upon which relief can be granted, pursuant to Fed.R.Civ.P. 12(b)(6), subject to plaintiff's opportunity to replead. That opinion set forth the requirements for pleading RICO injury and proximate causation.

On December 23, 1992 plaintiff submitted a 174-page amended complaint with appendices (the "Amended Complaint"), alleging injury from "loans in amounts substantially greater than it would have made had it known the true value of the properties securing the loans and/or the borrowers' ability to service the loan debt," (Am.Compl. ¶ 10a) and from the adverse effects of loss reserves plaintiff took against those loans. (Am. Compl. ¶ 10b) Now defendants move to dismiss the Amended Complaint as well.

For the reasons stated below, defendants' motion is granted. Plaintiff has not alleged actual injury from the additional amounts it loaned to defendants—in excess of the amount it would have loaned had it known the truth about defendants' alleged misrepresentations—other than loan losses themselves. Plaintiff may recover for those loan losses, if and when they occur, at law or in foreclosure actions in accord with RPAPL § 1301, but plaintiff cannot allege RICO injury now. Accordingly, for the reasons stated below, and because there is no other basis for federal jurisdiction, the complaint is dismissed.

I.

Plaintiff's original claims are set forth fully in *First Nationwide Bank v. Gelt Funding, Inc.*, No. 92 Civ. 0790, 1992 WL 358759, 1992 U.S.Dist.LEXIS 18278 (S.D.N.Y. Nov. 30, 1992) (the "Opinion and Order"). That opinion held that plaintiff could not state RICO claims simply by alleging that defendants had induced plaintiff to lend money by falsely representing rental incomes and by concealing so-called "flip" transactions with other parties. Opinion and Order at 2, 4. More specifically, this Court held that plaintiff failed to plead adequately (1) "injury to business or property," and (2) proximate or loss causation. Opinion and Order at 4; *see* 18 U.S.C. § 1964(c); *Holmes v. Sec. Investor Protection Corp.*, —— U.S. ——, ——, 112 S.Ct. 1311, 1317, 117 L.Ed.2d 532 (1992); *Hecht v. Commerce Clearing House, Inc.*, 897 F.2d 21, 23-24 (2d Cir.1990).

Plaintiff's Amended Complaint alleges two RICO violations (Am.Compl. ¶¶ 112-162) and state common law claims of fraud, conspiracy to defraud, negligent misrepresentation, conversion, conspiracy to convert, unjust enrichment, and breach of fiduciary duty. (Am.Compl. ¶¶ 163-172) Plaintiff's first RICO claim is against only defendants Gelt Funding Corp., Allen I. Gross, and Ralph Herzka. (the "Gelt Defendants") Defendant Gelt Funding was the mortgage broker for

the loans in the Amended Complaint. (Am.Compl. ¶ 21) Defendant Gross was president of Gelt Funding and its principal shareholder. (*Id.* ¶ 22) Defendant Herzka was an officer and employee of Gelt Funding. (*Id.*) Plaintiff's second RICO claim is against all defendants including the Gelt Defendants and several defendant borrowers. (Am.Compl. ¶¶ 24-59)

In the Amended Complaint, plaintiff seeks to fill the gaps in its RICO claims by pleading two additional kinds of injury. First, plaintiff claims that it

> made loans in amounts substantially greater than it would have made if it had known the true value of the properties securing the loans and/or the borrowers' ability to service the loan debt, resulting in losses [which] were not the proximate result of any general decline in the New York real estate market.

(Am.Compl. ¶ 10a) For each of the 30 loans described in the Amended Complaint, plaintiff estimates the actual value of the loan property in order to determine, based on certain lending criteria, what it would have loaned against that property value and what it would have lost had it made such a loan. (Am.Compl. ¶ 70 (1)-(3)) Then plaintiff compares that hypothetical loss with its actual losses to determine what portion of its injury is attributable to defendants' fraud. (Am.Compl. ¶ 70(4)) Plaintiff alleges that defendants overstated the gross income of properties on average by 31%, and that consequently plaintiff loaned at least 64% more than it would have loaned had it known the truth. (Am.Compl. ¶ 69) Thus, plaintiff alleges injury from these additional amounts of loans to defendants.

Second, plaintiff claims that its

> ability to lend money to others has been adversely affected by the fact that [it] has been required to place in reserve amounts roughly

> equal to the outstanding principal balance of the defaulted Gelt loans less the estimated current value of the properties securing these loans....

(Am.Compl. ¶ 10b) To support this claim, plaintiff estimates the reserves against loan losses it would have taken had it made loans based on truthful information, and compares the annual loss it would have incurred as a result of divesting assets and liabilities to take those reserves, with the actual loss it incurred from reserves it took against loans that were based on allegedly false information. (Am.Compl. 70(5)-(8)) Thus, plaintiff alleges injury from the consequences of the additional sums loaned to defendants.

It appears from the papers that the illustrative example in the previous opinion, *see* Opinion and Order at 11-12, helped the parties to focus on certain issues. Therefore, as a preliminary matter, it may be useful to extend that example based on the additional allegations in the Amended Complaint, as follows: Suppose that Bank lends $100 to Borrower based on Borrower's misrepresentations. The loan is secured by a mortgage on Borrower's property. Following a local real estate market collapse, Borrower's property declines in value. Borrower defaults on the loan, and Bank sues, alleging RICO violations. Bank demonstrates that had it known the truth about the matters Borrower misrepresented, Bank would have loaned only $50. Because Bank would have loaned $50 to Borrower even if it had known the truth, Bank's claim as to the first $50 would be dismissed—for the same reasons plaintiff's claims were dismissed in the previous opinion. However, Bank claims that its injury arises also from (1) the additional $50 which it loaned, and (2) the lost profits from taking additional required reserves. These additional claims relate only to injury from additional amounts loaned, not from the decision to lend in the first place. The holding in this opinion, in terms of this hypothetical example, is that Bank's first additional claim fails because Bank does not allege any injury

beyond that resulting from the actual loan, *i.e.*, beyond simply the amount of the loan attributable to untruthful information, and the second additional claim fails because the Bank alleges neither injury nor proximate causation under RICO.

II.

The previous Opinion and Order dismissed plaintiff's claims with respect to the nine loans in the original complaint on which borrowers had already defaulted, because New York's "one action" rule prevents plaintiff from seeking to enforce rights upon default by pursuing a legal remedy and an equitable remedy at the same time. RPAPL § 1301 ("Section 1301"); *see* Opinion and Order at 5-6 (citing cases). Plaintiff's "streamlined" complaint contains fewer loans that are in default. (Def.Mem. at 10; Pl.Mem. at 21) With respect to loans in default, plaintiff argues that the Amended Complaint contains allegations in addition to and separate from claims relating to any foreclosure action on the loans at issue, or from any claims at law or equity on the debt itself. Plaintiff alleges that its "success or failure in pending foreclosure actions...will affect only the quantification of [its] damages, not the fact of its injury." (Pl.Mem. at 20)

The new allegations in the Amended Complaint—which stem from the additional amounts plaintiff alleges it would not have loaned had it known the truth—are no different from the allegations in the original complaint. The reasoning in the previous Opinion and Order applies to those allegations as well:

> the Bank cannot allege RICO injury if damages depend on the failure of its foreclosure actions. If the Bank successfully forecloses on the [loans in default], it will not sustain any injury from those loans—under RICO or otherwise. RICO injury cannot be contingent upon the instigation or outcome of related litigation.

Opinion and Order at 6 (citing *Anitora Travel, Inc. v. Lapian*, 677 F.Supp. 209, 216 (S.D.N.Y.1988)).

Section 1301, a New York law, does not limit the reach of RICO, but it supports the rule that a party may not sue under RICO to recover on a defaulted loan and, at the same time, foreclose on the loan. *See* Opinion and Order at 6. Section 1301 prohibits any party from commencing an action "to recover any part of the mortgage debt, without leave of court," when another action on the same mortgage "is pending or [has reached] final judgment." RPAPL § 1301(3); *see FDIC v. Home Savings Bank*, 1993 WL 41818, 1993 U.S.Dist.LEXIS 1988 (E.D.N.Y. Feb. 4, 1993) (to the extent suit for fraud was based on mortgage debt, suit was barred by Section 1301); *but see Dollar Dry Dock Bank v. Piping Rock Builders, Inc.*, 181 A.D.2d 709, 710, 581 N.Y.S.2d 361 (2d Dep't 1992) (Section 1301 not a bar to a fraudulent conveyance action because "the subject matter of the fraudulent conveyance action is a different parcel than those that are the subject matter of the foreclosure action"). As Judge Raggi held recently in *FDIC v. Home Savings Bank*, "[i]n essence, Section 1301 forces a mortgagee into an election of remedies between, on the one hand, an action in equity for foreclosure, in which a deficiency judgment may then also be sought, or, on the other hand, an action at law on the debt." 1993 WL 41818, at *4, 1993 U.S.Dist.LEXIS 1988, at *14-15 (citing cases). Accordingly, plaintiff's allegations relating to loans already in default are dismissed.

With respect to loans in the Amended Complaint that are not in default, plaintiff has not satisfied the rule that a "plaintiff will only have standing if it alleges the existence of an actual, present injury, not some speculative injury, not some speculative injury that might only possibly occur in the future...." *Anitora Travel v. Lapian*, 677 F.Supp. at 216 (citing cases). Although plaintiff has alleged that the default rate on its loans to defendants was higher than the default rate on other loans (Am.Compl. ¶ 6), that fact alone does not

generate a RICO claim. In its original complaint plaintiff alleged harm from possible future defaults and the adverse impact of actual and threatened defaults on its ability to lend, neither of which is compensable under RICO. Opinion and Order at 5. To the extent the Amended Complaint continues to allege that kind of injury, it fails to state a claim. The additional allegations of injury in the Amended Complaint—arising from (1) additional amounts plaintiff was induced to lend, and (2) loan loss reserves relating to those additional amounts—do not satisfy RICO's pleading requirements either, as described below.

As to the first type of injury, plaintiff argues that it was injured "at the time [it] made the loans, resulting from the fact that [it] received much less security for the repayment of its advances (and assumed much greater risks) than [it] was led to believe." (Pl.Mem. at 6) In other words, plaintiff pleads injury stemming from additional risks it assumed on the day it funded each of the allegedly fraudulent loans.

This novel theory of injury, based on plaintiff's assumption of "additional risk"— other than default risk—is not only incorrect, but is also a prescription for ceaseless litigation. According to plaintiff's argument, a claimant could recover under RICO for "additional risk" it unknowingly assumed on a loan, even if the loan was repaid. I was momentarily dismayed to see that plaintiff's authority for this theory was my own decision in *U S West Fin. Servs. v. Marine Midland Realty Credit Corp.*, 810 F.Supp. 1393 (S.D.N.Y.1993), an opinion which dealt with "benefit of the bargain" damages in an unusual breach of contract case, and which is irrelevant here.

U S West dealt with contract damages where what was bargained and paid for was one risk, and what was delivered was another. That opinion has nothing to do with fraud damages. Moreover, the Second Circuit has rejected plaintiff's approach in fraud actions. *See Ostano Commerzanstalt v. Telewide*

Systems, Inc., 794 F.2d 763, 766 (2d Cir.1986), *on remand* 684 F.Supp. 1172 (S.D.N.Y.1988), *mod. remanded*, 880 F.2d 642 (2d Cir.1989). To the extent *Sigman v. Stevens-Norton, Inc.*, 70 Wash.2d 915, 425 P.2d 891 (1967) stands for the proposition that a plaintiff lender may recover in fraud for additional risk incurred at the time of a loan, I respectfully decline to follow that holding. Consistent with the Opinion and Order, plaintiff cannot allege RICO injury arising from additional risks it assumed at the time it loaned money, while at the same time retaining the ability to be made whole by realizing on the loan collateral prior to default. Again, mere speculation that some injury might occur is insufficient to state a civil RICO claim. *See Bankers Trust Co. v. Rhoades*, 859 F.2d 1096, 1104 (2d Cir.1988), *cert. denied*, 490 U.S. 1007, 109 S.Ct. 1642, 104 L.Ed.2d 158 (1989).

The second type of damage plaintiff seeks is "for the on-going injury to its overall business resulting from the fact that the losses on the fraud-induced loans have impaired [its] capital, constraining its operations and earnings." (Pl.Mem. at 25) In a nutshell, plaintiff's argument (Pl.Mem. at 26-28) is that when it discovered defendant's fraudulent loans, it was required to write off the loans or take a special reserve against the loans, either of which reduced plaintiff's assets and capital. Then, in order to maintain its required minimum capital ratio, plaintiff had to shrink its assets and liabilities by selling loans and consumer savings accounts, thereby diminishing its earnings. Thus, plaintiff alleges injury from the date it took additional reserves until the date it recovers any loss on the loans, if ever. Plaintiff claims that "[t]his is precisely the sort of injury that RICO was intended to remedy," (Pl.Mem. at 28)

Plaintiff has not stated a RICO claim relating to this second type of injury. This remote injury is not "precisely the sort of injury that RICO was intended to remedy." Even accepting plaintiff's argument that "[c]onsistent with the broad remedial purpose of RICO, there is no single appropriate measure of damages," (Pl.Mem. at 34) the second type of injury

does not meet RICO's pleading requirements. Civil RICO damages "are unrecoverable if the fact of their accrual is speculative or their amount and nature unprovable." *Bankers Trust Co. v. Rhoades,* 859 F.2d 1096, 1104 (2d Cir.1988), *cert. denied,* 490 U.S. 1007, 109 S.Ct. 1642, 104 L.Ed.2d 158 (1989). "A plaintiff only has standing if, and can only recover to the extent that, he has been injured in his business or property by the conduct constituting the violation." *Sedima, S.P.R..L. v. Imrex Co.,* 473 U.S. 479, 496, 105 S.Ct. 3275, 3285, 87 L.Ed.2d 346 (1985).

Plaintiff alleges that because it "is required to take a specific reserve for the actual losses incurred on an individual loan," (Pl.Mem. at 30) its losses are neither speculative nor unprovable. In deciding whether a party may recover lost profits for RICO violations, a court should look to "appropriate common law remedies in the forum state." *Shulton, Inc. v. Optel Corp.,* 698 F.Supp. 61, 62 (D.N.J.1988); *see also Sound Video Unlimited, Inc. v. Video Shack Inc.,* 700 F.Supp. 127, 141-42 (S.D.N.Y.1988) (applying Illinois law, which allows recovery of lost profits in fraud cases); *DeMent v. Abbott Capital Corp.,* 589 F.Supp. 1378, 1386 (N.D.Ill.1984) (same); *AAMCO Transmission, Inc. v. Marino,* 1992 WL 38120, at *4-5, U.S.Dist.LEXIS 2081, at *16, 20 (E.D.Pa. Feb. 20, 1992) (applying Pennsylvania law, which allows recovery of lost profits in fraud cases). New York law expressly prohibits recovery of "lost profits" in fraud actions, and plaintiff's RICO claims—which sound almost exclusively in fraud—cannot include a claim for "lost profits." *See, e.g., AFA Protective Sys., Inc. v. American Tel. & Tel. Co.,* 57 N.Y.2d 912, 456 N.Y.S.2d 757, 442 N.E.2d 1268 (1982); *Reno v. Bull,* 226 N.Y. 546, 124 N.E. 144 (1919). Nevertheless, plaintiff argues that New York courts have allowed recovery of certain consequential damages in fraud cases where the additional damage was, as plaintiff's note, a "direct pecuniary loss." (Pl.Mem. at 34) *See, e.g., Cayuga Harvester v. Alice Chalmers Corp.,* 95 A.D.2d 5, 23, 465 N.Y.S.2d 606,

618 (1983); *Morris v. Lewis,* 75 A.D.2d 844, 427 N.Y.S.2d 858 (1980).

Although it is not clear whether and when a plaintiff in federal court in New York may recover lost profits for a RICO claim which is predicated on fraud, plaintiff's second type of injury is not a "direct pecuniary loss," That plaintiff was required to take reserves against loan losses reveals little about plaintiff's actual loss, or even whether plaintiff's assessment of the loan losses was correct. Plaintiff cannot allege RICO injury simply by stating that it followed a statutory requirement in connection with a transaction that may result in a loss. Plaintiff cannot recover every additional expense it can think of by alleging that it incurred that expense while following rules and guidelines. If a loan does not itself result in a provable loss, plaintiff cannot recover expenses incurred in a transaction that may turn out no worse than it would have if the underlying information had been truthful. To put the matter more starkly, expenses incurred in making a profit do not become fraud damages simply because the transaction would not have been entered into had the truth been known. Moreover, the taking of loan loss reserves is based on managerial guesswork about the future economic fortune of a commercial real estate loan portfolio—guesswork that includes, at minimum, an assessment of the amount of the loan that may be lost due to fraud, as well as the capacity of the loan collateral to generate cash flow over time, a capacity that in turn depends on the economics of the real estate market. Plaintiff cannot survive a motion to dismiss by alleging novel and speculative compensatory damages that may or may not arise from fraud.

In addition to the indirectness of injury caused by taking additional reserves, such injury may have been unnecessary. As defendants point out and plaintiff admits (Pl.Mem. at 27 n. 15; Am.Comp. ¶ 17), plaintiff had two options to maintain its minimum required capital: (1) shrinking itself through divestment, which it did and which caused its alleged lost profits, or

(2) enlarging itself through infusions of equity capital, which it did not. Apparently, plaintiff chose to shrink because it was unsure of its ability to profit from new loans. Defendants argue that plaintiff had a duty to pursue the second option, an infusion of equity capital, under the "doctrine of avoidable consequences"—a rule that a tort victim must take reasonable measures to avoid the consequences of another's wrongdoing. (Def. Reply at 19 n. 7) *See, e.g., Jenkins v. Etlinger,* 55 N.Y.2d 35, 447 N.Y.S.2d 696, 432 N.E.2d 589 (1982). Plaintiff argues that this doctrine does not apply here. (Pl.Mem. at 27 n. 16) However, even if plaintiff had no duty to pursue the second option, the availability of another option suggests that the injury arising from the loan loss reserves was speculative. As stated above, civil RICO damages "are unrecoverable if the fact of their accrual is speculative or their amount and nature unprovable." *Bankers Trust Co. v. Rhoades,* 859 F.2d at 1104. Although plaintiff was required to maintain a minimum capital ratio, plaintiff was not required to take loan loss reserves. In other words, plaintiff might not have suffered injury from taking the reserves if it had pursued an infusion of equity capital instead. That plaintiff could have avoided such injury is additional proof that the injury was speculative.

For the above reasons, plaintiff has not alleged RICO injury with respect to the loan loss reserves.

III.

The prior Opinion and Order dismissed plaintiff's claims also because plaintiff failed to allege proximate or "loss" causation. *See* Opinion and Order at 9-20; *Hecht v. Commerce Clearing House, Inc.,* 897 F.2d 21, 23-24 (2d Cir.1990). This Court applied the more specific rule that

> a borrower who misstates the value of loan property or its rental income proximately causes injury to a bank when (1) the misrepresented value of the property was substantially above its actual value at the time of the

> misrepresentation, (2) the injury was sustained soon after the misrepresentation, and (3) external factors did not contribute to the injury.

Opinion and Order at 11 (citing *Finkel v. Stratton Corp.*, 754 F.Supp. 318 (S.D.N.Y. 1990)). The above rule applies when a borrower misrepresents facts to a bank, and the bank alleges injury because those facts induced it to make a loan. Although this plaintiff has indicated that the misrepresented values of the loan properties were greater than their actual values, plaintiff did not sustain injury until five years after it began lending to and through defendants, and the real estate market collapse coincided with plaintiff's injury. Therefore, to the extent this plaintiff continues to allege injury solely because it was induced to make loans to defendants, plaintiff continues to fail the above test.

In addition, for the reasons stated in the previous Opinion and Order, the allegations stemming from additional loan loss reserves do not satisfy the Second Circuit's "loss causation" requirements. *See* Opinion and Order at 9-20 (citing cases). The taking of loan loss reserves is an inherently speculative and unreliable measure of actual damages because reserves do not represent realized losses, but rather a contingent estimate of anticipated future losses.

On the other hand, plaintiff has satisfied the more general proximate causation test in this Circuit with respect to the first type of injury it alleges—relating to additional amounts plaintiff loaned to defendants. According to the two-pronged test in *Hecht v. Commerce Clearing House, Inc.*,

> the RICO pattern or acts proximately cause a plaintiff's injury if they are a substantial factor in the sequence of responsible causation, and if the injury is reasonably foreseeable or anticipated as a natural consequence.

897 F.2d at 23-24. *See also Ceribelli v. Elghanayan,* 990 F.2d 62, 65 n. 3 (2d Cir. 1993) (citing *Holmes v. Sec. Investor Protection Corp.,* —— U.S. at —— - ——, 112 S.Ct. at 1316-18; *Manufacturers Hanover Trust Co. v. Drysdale Sec. Corp.,* 801 F.2d 13, 20-22 (2d Cir.1986), *cert. denied,* 479 U.S. 1066, 107 S.Ct. 952, 93 L.Ed.2d 1001 (1987)). Although the alleged misrepresentations were not a "substantial factor in the sequence of responsible causation" with respect to losses from the loans generally, *see Citibank, N.A. v. K-H Corp.,* 968 F.2d 1489, 1495 (2d Cir. 1992), the alleged misrepresentations were *the* factor that contributed to any losses from the additional amounts loaned by plaintiff. Conversely, although the real estate market collapse may have "caused" the injury which resulted from plaintiff's decision to lend to defendants—with the corresponding result that defendants' misrepresentations did not "cause" such injury—*see* Opinion and Order at 14, the market collapse did not "cause" that injury which the Amended Complaint alleges resulted dollar for dollar from additional amounts plaintiff loaned to defendants. The injury from those additional amounts was not merely "reasonably foreseeable"—it was inevitable—as a natural consequence of defendants' alleged misrepresentations. Although courts in the Second Circuit are skeptical of claims made in the wake of market declines, neither do courts sanction the use of coincidental market declines to escape liability. *See, e.g., K-H Corp.,* 968 F.2d at 1497; *Finkel v. Stratton Corp,* 754 F.Supp. at 330.

However, plaintiff cannot survive defendants' motion to dismiss simply by pleading proximate causation relating to the additional loan amounts in the Amended Complaint. Plaintiff's claims cannot survive, because plaintiff has not alleged facts which, if established, would prove RICO injury based on the additional loan amounts, as described above.

IV.

Plaintiff's second RICO claim—against the Gelt Defendants and against the borrowers—must be dismissed for an

additional reason: it does not plead adequately the existence of an "enterprise" among all defendants, as required by 18 U.S.C. § 1961(4). Plaintiff's second RICO claim differs from its first RICO claim only in that it includes all defendants, not just the Gelt Defendants. Plaintiff's allegations of an "enterprise" with respect to all defendants are contained in paragraphs 125-27 of the Amended Complaint:

> at various times as early as 1985, and possibly earlier, through at least 1990, Gelt, Gross, Herzka, and all the other defendants were associated in fact for the common purpose, among others, of defrauding First Nationwide through the loan transactions described in this complaint and other means. This association in fact was an "enterprise" (the "Borrower Enterprise") as that term is defined in 18 U.S.C. § 1961(4). [Plaintiff] alleges that Gelt, Gross, and Herzka, and all the other defendants were employed by or associated with the Borrower Enterprise.

(Am.Compl. ¶¶ 125-27) In essence, plaintiff alleges simply that loan transactions occurred which involved one mortgage broker—defendant Gelt, and different borrowers, and labels this series of unrelated loans a "Borrower Enterprise." Here, plaintiff alleges a classic "hub and spoke" conspiracy, in which the Gelt Defendants were the "hub," and the various borrower defendants were the "spokes." That is not, properly speaking, a common law conspiracy. *See, e.g., Kotteakos v. United States,* 328 U.S. 750, 769, 66 S.Ct. 1239, 1250, 90 L.Ed. 1557 (1946).

However, as Judge Weinstein recognized, "[w]ith the enactment of RICO, Congress supplemented traditional 'chain' and 'wheel' theories with a new conspiratorial concept—the enterprise." *United States v. Gallo,* 668 F.Supp. 736, 747 (E.D.N.Y.1987); *see also United States v. Biaggi,* 672

F.Supp. 112, 119 n. 15 (S.D.N.Y. 1987); *United States v. Elliott,* 571 F.2d 880, 900 (5th Cir.1978). A RICO "enterprise" is defined as "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4); *see, e.g., Three Crown Ltd. Partnership v. Caxton Corp.,* 817 F.Supp. 1033, 1045 n. 25, 1993 WL 74794, at *14 n. 25 (S.D.N.Y.1993); *Bogart v. Shearson Lehman Bros., Inc.,* No. 91 Civ. 1036, 1993 WL 33643, at *6, 1993 U.S.Dist.LEXIS 1182, at *17 (S.D.N.Y. Feb. 3, 1993); *United States v. Local 1804-1, Int'l Longshoremen's Assoc.,* 812 F.Supp. 1303, 1309 (S.D.N.Y.1993). The Supreme Court has held that a RICO "enterprise" is a "group of persons associated together for a common purpose of engaging in a course of conduct.... [It is] proved by evidence of an ongoing organization, formal or informal, and by any evidence that the various associates function as a continuing unit." *United States v. Turkette,* 452 U.S. 576, 583, 101 S.Ct. 2524, 2528, 69 L.Ed.2d 246 (1981); *see also Cullen v. Paine Webber Group, Inc.,* 689 F.Supp. 269, 273 (S.D.N.Y.1988) (clients of broker-plaintiffs did not constitute an "enterprise" "any more than would, for example, a stamp collection").

Courts in the Second Circuit must look to the "hierarchy, organization, and activities" of an association-in-fact to determine whether "its members functioned as a unit." *United States v. Coonan,* 938 F.2d 1553, 1560-61 (2d Cir.1991). For an association of individuals to constitute an "enterprise," the individuals must "share a common purpose to engage in a particular fraudulent course of conduct and work together to achieve such purposes." *Moll v. U.S. Life Title Ins. Co.,* 654 F.Supp. 1012, 1031 (S.D.N.Y.1987) (citing cases). For example, in *Moll v. U.S. Life,* Judge Leisure dismissed, with leave to amend, a complaint that alleged that members of an "enterprise" provided real estate settlement services to purchasers of real estate and received kick-backs, because the complaint did not "specify how these members joined

together as a group to achieve these purposes," and did not include "factual allegations regarding the continuity of structure or personnel of this group." *Moll v. U.S. Life Title Ins.*, 654 F.Supp. at 1032.

Plaintiff has not specified how all defendants, including various borrowers, joined together as a group to perpetrate the frauds alleged in the Amended Complaint. Plaintiff has not pleaded any facts regarding the continuity of structure or personnel of the "Borrower Enterprise." Plaintiff merely asserts that for over six years defendants shared common fraudulent purposes and plans. Conclusory allegations that disparate parties were associated in fact by virtue of their involvement in the real estate industry in the 1980s are insufficient to sustain a RICO claim, absent allegations as to how the members were associated together in an "enterprise." Nor does common sense support the existence of such an "enterprise." Rather, it appears at worst that several borrowers each committed a similar but independent fraud with the aid of a particular lender, and that each such borrower acted on a particular occasion to benefit himself or herself and not to assist any other borrower. That series of discontinuous independent frauds is no more an "enterprise" than it is a single conspiracy. *Cf. Kotteakos, supra.* Accordingly, plaintiff's second RICO claim against all defendants is dismissed.

V.

Finally, defendants have challenged plaintiff's claims on several other grounds, including failure to comply with Fed.R.Civ.P. 9(b) and failure to satisfy certain pleading elements of RICO and common law. Plaintiff claims that this "Court has already disposed of the defendants' other challenges to the Amended Complaint." (Pl.Mem. at 56) That is incorrect. Plaintiff complains that "[f]ully 75% of the briefing on the prior motions was devoted to these matters. But in its Opinion and Order of November 30, 1992, the Court concluded that the original complaint was deficient in only two

regards...." (*Id.*) Because the Opinion and Order did not address those other matters at all, it held that the original complaint was deficient in *at least* two regards—failure to plead RICO injury and proximate cause. Nevertheless, because plaintiff continues to fail to satisfy those two basic pleading requirements of RICO, I need not address additional matters.

In sum, plaintiff has not pleaded facts that give this Court jurisdiction to explore plaintiff's roundhouse assertion "that this case involves one of the most stunning and massive instances of white-collar crime and bank fraud in recent history, involving over $100 million in losses." (Pl.Mem. at 1) Accordingly, plaintiff's claims are dismissed.

SO ORDERED.

EXHIBIT 4

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FIRST NATIONWIDE BANK, A FEDERAL SAVINGS BANK, a federal stock association, Plaintiff, - against- GELT FUNDING CORP., ALLEN I. GROSS, RALPH HERZKA, SHIMON ECKSTEIN, 505 REALTY ASSOCIATES, PROSPECT REALTY ASSOCIATES, JUDA WOLF, MEIR UNSDORFER, NEW HEIGHTS 765 RIVERSIDE LIMITED PARTNERSHIP, NEW HEIGHTS (765 RIVERSIDE) MANAGEMENT CORP., 1691 EASTBURN REALTY CO., SOL GROSS (a/k/a EUGENE GROSS), JOSEPH FRIEDMAN, 1261 CENTRAL AVENUE OWNERS CORP., 65-11 REALTY CO., AVIEZIER COHEN, ELAINE COHEN, 730 REALTY ASSOCIATES, DAVID MALEK, PETER REBENWURZEL, 36 PLAZA STREET OWNERS CORP., ROBERT WOLF, 350 STERLING ASSOCIATES, EDITH GROSS, BROOKHAVEN REALTY ASSOCIATES, CROWN EQUITIES LIMITED PARTNERSHIP, ADAR TWO REALTY CO., 100 REALTY COMPANY, ESTHER SHUR, E. PHILLIP WEINGARTEN, NEW HEIGHTS (173-174) LIMITED PARTNERSHIP, TEMPLE	) CASE NO.) 92 CIV. 0790.) (MBM))) AMENDED) COMPLAINT)) JURY TRIAL) DEMANDED) ON ALL) CAUSES OF) ACTION

APARTMENTS MANAGEMENT CORPORATION, 740 REALTY ASSOCIATES, 2344 DAVIDSON ASSOCIATES, JACOB RABINOWITZ, 1958 REALTY ASSOCIATES, MENACHEM HALBERSTAM, MORDECHAI HALBERSTAM, 273 REALTY ASSOCIATES, 2608 REALTY ASSOCIATES, SOLOMON WERDIGER, AND ESTHER WERDIGER,

Defendants.

Plaintiff First Nationwide Bank, A Federal Savings Bank ("First Nationwide"), by its attorneys, Folger & Levin and Schulte Roth & Zabel, for its complaint against defendants, alleges as follows:

1. Plaintiff brings this action to recover damages for losses it has suffered and expects to suffer as a result of a scheme pursuant to which defendants fraudulently induced plaintiff to make non-recourse loans by misrepresenting (1) the value of the commercial properties securing the loans and (2) the borrowers' ability to pay the loan debt on a timely basis. Plaintiff cannot determine at this time the full extent of its losses resulting from defendants' fraudulent and illegal conduct, but estimates that they exceed $115,000,000. As set forth more fully below, defendants' fraudulent conduct involved repeated, related instances of criminal wire, mail, and bank fraud continuing from 1985 through at least 1990, in violation of the federal Racketeer Influenced and Corrupt Organizations Act as well as other federal and state laws.

TABLE OF CONTENTS

	Page
Jurisdiction and Venue	4
The Commercial Loans	4
The Discovery of Fraud	6
The Scheme to Defraud	7
Injury	10
The Parties	11
Fraudulent Loans	22
The 100 Realty Company Loan of December, 1985	28
The East 13th Street Associates Loan of May, 1986	32
The West 34th Street Associates Loan of December, 1986	35
The 4395 Broadway Owners Loan of April, 1987	40
The Marlborough Associates Loan of August, 1987	43
The 43rd Owners Loan of September, 1987	46
The Ditmas Garden Associates Loan of September, 1987	49
The New Heights (173-174) Limited Partnership Loan of November, 1987	52
The 505 Realty Loan of December, 1987	57
The Prospect Realty Loan of December, 1987	61
The New Heights 765 Riverside Limited Partnership Loan of January, 1988	66

The Eastburn Realty Loan of January, 1988 71

The 46th Street Apartments Loan of January, 1988 75

The Flatbush Realty Loan of April, 1988 79

The 730 Realty Loan of May, 1988 82

The 740 Realty Loan of May, 1988 88

The Central Owners Loan of May, 1988 93

The 2608 Realty Loan of August, 1988 98

The Plaza Street Owners Loan of August, 1988 102

The 1958 Realty Loan of October, 1988 107

The 2344 Davidson Associates Loan of October, 1988 111

The 46th Street Owners Loan of October, 1988 114

The Brookhaven Realty Loan of November, 1988 118

Sterling Associates Loan of November, 1988 122

The Crown Equities Loan 127

The 273 Realty Loan of April, 1989 133

The Bonetto Realty Loan 136

The Cavaliero Realty Loan 140

The Verdin Realty Loan 144

The Adar Two Realty Loan of August, 1989 148

Mail and Wire Fraud 154

Gross's Representation of First Nationwide and Conflicts of Interest 154

FIRST CAUSE OF ACTION FOR VIOLATIONS OF RICO §§ 1962(c), 1962(d) (against defendants Gelt, Gross, and Herzka) 157

SECOND CAUSE OF ACTION FOR VIOLATIONS OF RICO §§ 1962(c), 1962(d) (against all defendants) 160

THIRD CAUSE OF ACTION FOR FRAUD (against all defendants) 163

FOURTH CAUSE OF ACTION FOR CONSPIRACY TO DEFRAUD (against all defendants) 165

FIFTH CAUSE OF ACTION FOR NEGLIGENT MISREPRESENTATION (against Gelt, Gross, and Herzka) 167

SIXTH CAUSE OF ACTION FOR CONVERSION (against all defendants) 169

SEVENTH CAUSE OF ACTION FOR CONSPIRACY TO CONVERT (against all defendants) 170

EIGHTH CAUSE OF ACTION FOR UNJUST ENRICHMENT (against all defendants) 170

NINTH CAUSE OF ACTION FOR BREACH OF FIDUCIARY DUTY (against defendant Gross) 171

Jury Trial Demand 172

Jurisdiction and Venue

2. This Court has subject matter jurisdiction over the first and second causes of action of this complaint pursuant to Section 1964 of the Racketeer Influenced and Corrupt Organization Act ("RICO"), 18 U.S.C. §§ 1961, *et seq.*, and 28 U.S.C. § 1331. This Court has pendent subject matter jurisdiction over the remaining causes of action alleged in this complaint.

3. Venue is proper in this district pursuant to 28 U.S.C. § 1391(b) and 18 U.S.C. § 1965(a), because First Nationwide's claims arose, and defendants transacted business with First Nationwide, in the Southern District of New York.

The Commercial Loans

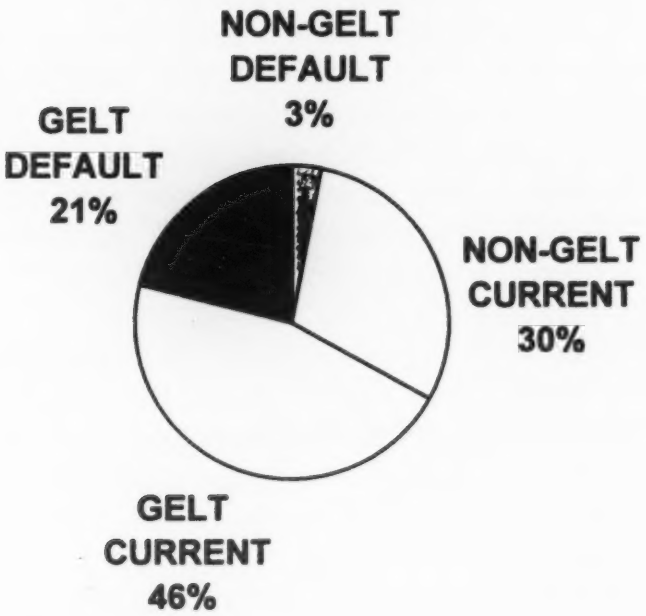
4. Before May 1985, First Nationwide's business in the greater New York city metropolitan area consisted principally of making loans to individuals secured by their personal residences, usually to finance the purchases of those residences. In about May 1985, First Nationwide expanded its business in the greater New York city metropolitan area by offering and making non-recourse loans secured by commercial properties, principally multi-unit apartment buildings. First Nationwide is informed and believes, and on that basis alleges, that at about this same time, defendant Gelt Funding, Corp. ("Gelt") began to act as a commercial mortgage broker representing the interests of owners and potential buyers of commercial properties seeking financing for commercial properties.

5. As a commercial mortgage broker, Gelt acted as the agent for prospective borrowers seeking loans for commercial properties in return for a fee paid by the borrower, typically a percentage of the amount of the loan.

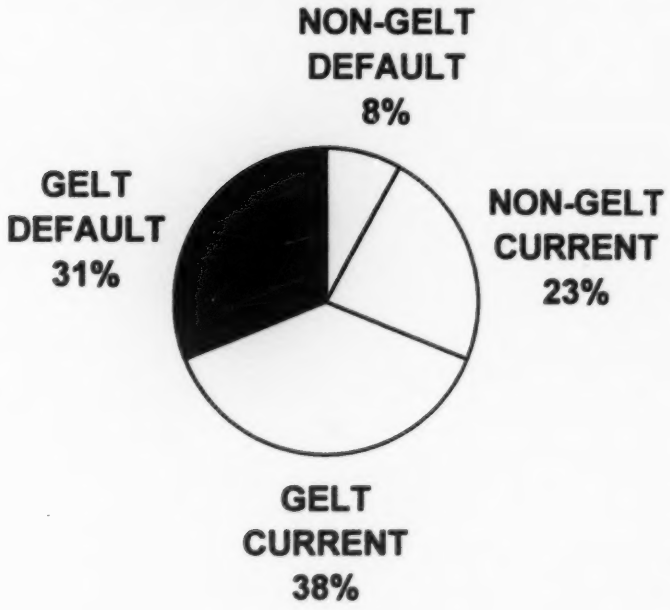
6. From about May 1985 to November 1990, First Nationwide's New York office made over 1,000 non-recourse loans to owners and purchasers of commercial property, in an aggregate amount of approximately $1.3 billion. Of that amount, approximately $900,000,000 (70% by dollar amount) was loaned to borrowers whom Gelt represented as a commercial mortgage broker ("Gelt Loans"). Of the Gelt loans, approximately 31% have gone into default. By comparison, only 9.5% of First Nationwide's non-Gelt loans have gone into default, which is comparable to the default rate on similar loans made by other lenders in the same market. The composition of First Nationwide's portfolio is illustrated below:

First Nationwide Bank
New York Commercial Portfolio

By Number of Loans



By Dollar Amount Outstanding



DEFAULT RATES

	By Number of Loans	By Amount Outstanding
GELT LOANS	31.31%	44.51%
NON-GELT LOANS	9.52%	17.82%
OTHER BANKS	9.08%	N/A

(Based on 543 Gelt & 273 Non-Gelt Loans:
139 Loans not included due to incomplete information.)

7. In about November 1990, First Nationwide decided to phase out its commercial lending business and stopped making commercial loans through its New York office.

The Discovery of Fraud

8. In 1991, during the course of an audit of First Nationwide's commercial loan portfolio, First Nationwide identified potential irregularities and deficiencies in Gelt Loans. Among other things, First Nationwide ascertained that significantly more Gelt Loans were in default than other, similar loans made by First Nationwide at the same time. As a result, First Nationwide started an investigation during which it discovered for the first time that Gelt had been defrauding First Nationwide since at least 1985 in connection with Gelt Loans.

The Scheme to Defraud

9. First Nationwide is informed and believes, and on that basis alleges, that Gelt and the other defendants knowingly or recklessly submitted to First Nationwide false, incomplete, and misleading material information, (i) misrepresenting, among other things, the gross and net operating incomes of properties, and (ii) concealing, among other things, that (a) prospective borrowers were acquiring properties through "flip" transactions (such as transactions in which one person contracts to buy a piece of property and assigns the purchase contract to another for a premium over the contract price) and (b) that borrowers had obtained or intended to obtain additional financing using as collateral the same property securing First Nationwide's loan. First Nationwide is informed and believes, and on that basis alleges, that Gelt and the other defendants made these misrepresentations with the intention of inducing First Nationwide to make loans to Gelt's clients.

10. First Nationwide justifiably relied upon the misrepresentations Gelt and others made to it. As a result of relying

upon the misrepresentations, First Nationwide made loans it would not have made had it known the true facts, and was injured in at least two ways:

a. First Nationwide made loans in amounts substantially greater than it would have made if it had known the true value of the properties securing the loans and/or the borrowers' ability to service the loan debt, resulting in losses illustrated with particularity in paragraphs 71 through 100 of this Complaint, which losses were not the proximate result of any general decline in the New York real estate market;

b. First Nationwide's ability to lend money to others has been adversely affected by the fact that First Nationwide has been required to place in reserve amounts roughly equal to the outstanding principal balance of the defaulted Gelt loans less the estimated current value of the properties securing those loans, as illustrated with particularity in paragraphs 71 through 100 of this Complaint.

Lending Criteria

11. In connection with each application for a loan made to First Nationwide by Gelt on behalf of a prospective borrower, First Nationwide requested, and Gelt and the prospective borrower provided, information concerning the prospective borrower and the commercial property that was to secure the loan. First Nationwide used and relied on that information in deciding whether to make a loan and in determining the amount and any conditions of the loan. In particular, First Nationwide requested, obtained and relied upon information about (i) the operating income of the property, (ii) the price for which the property was to be sold and/or the prices for which the property had been sold in the previous three years, and (iii) the borrower's intentions with respect to obtaining other financing secured by the property.

12. It was generally the practice of First Nationwide, in connection with commercial loans in the New York area, not to make loans unless (i) the ratio of the net operating income generated by the collateral property to the amount of all payments of interest and principal on all outstanding debt secured by the collateral property (the debt service coverage ("DSC") ratio) was at least 1.05 and usually 1.15, and (ii) the ratio of the loan amount to the value of the collateral property (the loan to value ("LTV") ratio) was less than 80%.

13. First Nationwide's practice was to inquire of prospective borrowers whether they were buying the property securing the prospective loan as part of a flip transaction. If the borrower was buying the collateral property as part of a flip transaction, First Nationwide would take that information into account in determining the value of the property securing the loan.

14. Further, it was and is First Nationwide's policy not to make a loan unless the borrower represents that the borrowers' cash downpayment amount consists of the borrowers' funds, as opposed to other borrowed money, unless the borrowed money is secured by other real property. If the borrowers' cash downpayment does consist of borrowed funds, First Nationwide will not make the loan.

Injury

15. All of the thirty Gelt Loans specifically identified in this Complaint are in default. First Nationwide (a) sold the property securing one of the loans at foreclosure; (b) has pending foreclosure actions with respect to twelve of the loans; (c) has sold four of the loans; and (d) has restructured five of the loans. With respect to the remaining seven loans, each of the borrowing entities has commenced bankruptcy proceedings.

16. The total amount required to cure the outstanding defaults on the twenty loans specifically identified in this complaint that have not been foreclosed, sold or restructured is approximately $10.2 million. The losses suffered by First Nationwide on the loans which have been foreclosed, sold or restructured total approximately $4.2 million, or 21% of the face amount of those loans.

17. When First Nationwide realizes losses or takes reserves against future losses that reduce First Nationwide's capital base to less than approximately 4% of its assets, First Nationwide must increase its capital to not less than approximately 4% of its assets by either (a) obtaining equity infusions or (b) divesting assets and liabilities. Since 1991, First Nationwide has reduced its assets and liabilities by over $1 billion as a direct and proximate result of defendants' fraud, violations of RICO, and other tortious conduct. As a consequence, First Nationwide has suffered and continues to suffer continuing direct injury in addition to the losses it has suffered on the Gelt loans in default, all as illustrated with greater particularity in paragraphs 71 through 100 of this Complaint.

18. First Nationwide estimates that as a consequence of the defendants' fraud, it made loans that were on average approximately 40% larger than it would have made if it had known the truth. Overall, First Nationwide estimates that it has suffered losses on the Gelt loans of $115,000,000, and has suffered and continues to suffer additional injury as a result of the effect of reserves that it has taken that are directly attributable to the defendants' fraud.

19. If First Nationwide had not made the fraudulent Gelt loans, it would not necessarily have invested its funds in the greater New York commercial real estate market because it had many alternative potential investments available to it, including residential loans in New York and elsewhere in the

United States, and commercial loans in other parts of the United States, as well as other types of investments, such as mortgage-backed securities.

The Parties

20. First Nationwide is, and at all times relevant to this complaint was, a federal stock association authorized to do business and doing business in New York, with its principal place of business in San Francisco, California.

21. First Nationwide is informed and believes, and on that basis alleges, that defendant Gelt is, and at all times relevant to this complaint was, a mortgage brokerage company incorporated in New York with its principal place of business in Brooklyn, New York. As a mortgage broker, Gelt acted as the agent for certain borrowers who sought or obtained loans from First Nationwide.

22. First Nationwide is informed and believes, and on that basis alleges, that defendant Allen I. Gross ("Gross") is, and at all times relevant to this complaint was, an individual residing in Brooklyn, New York. First Nationwide is informed and believes, and on that basis alleges, that Gross is, and at all times relevant to this complaint was, president of Gelt and its sole or principal shareholder. First Nationwide is informed and believes, and on that basis alleges, that Gross is, and at all times relevant to this complaint was, an attorney admitted to practice law before the courts of the State of New York.

23. First Nationwide is informed and believes, and on that basis alleges, that defendant Ralph Herzka ("Herzka") is, and at all times relevant to this complaint was, an individual residing in Brooklyn, New York. First Nationwide is informed and believes, and on that basis alleges that at certain times relevant to this complaint Herzka was an officer and/or employee of Gelt.

24. First Nationwide is informed and believes, and on that basis alleges, that defendant 505 Realty Associates is, and at all times relevant to this complaint was, a New York general partnership with its principal place of business in Brooklyn, New York.

25. First Nationwide is informed and believes, and on that basis alleges, that defendants Shimon Eckstein, Gross, and Herzka are, and at all times relevant to this complaint were, general partners of defendant 505 Realty Associates.

26. First Nationwide is informed and believes, and on that basis alleges, that defendant Prospect Realty Associates is, and at all times relevant to this complaint was, a New York general partnership with its principal place of business in Brooklyn, New York.

27. First Nationwide is informed and believes, and on that basis alleges, that defendants Juda Wolf and Meir Unsdorfer are, and at all times relevant to this complaint were, individuals residing in Brooklyn, New York. First Nationwide is informed and believes, and on that basis alleges, that defendants Shimon Eckstein, Gross, Herzka, Juda Wolf, and Meir Unsdorfer were, at times relevant to this complaint, general partners of defendant Prospect Realty Associates.

28. First Nationwide is informed and believes, and on that basis alleges, that defendant New Heights 765 Riverside Limited Partnership is, and at all times relevant to this complaint was, a Delaware limited partnership with its principal place of business in Brooklyn, New York.

29. First Nationwide is informed and believes, and on that basis alleges, that defendant New Heights (765 Riverside) Management Corp. is, and at all times relevant to this complaint was, a company incorporated in New York with its principal place of business in Brooklyn, New York. First

Nationwide is informed and believes, and on that basis alleges, that defendant New Heights (765 Riverside) Management Corp. is, and at all times relevant to this complaint was, the general partner of defendant New Heights 765 Riverside Limited Partnership.

30. First Nationwide is informed and believes, and on that basis alleges, that defendant 1691 Eastburn Realty Co. is, and at all times relevant to this complaint was, a New York general partnership with its principal place of business in Brooklyn, New York.

31. First Nationwide is informed and believes, and on that basis alleges, that defendants Sol Gross (a/k/a Eugene Gross) and Joseph Friedman are, and at all times relevant to this complaint were, individuals residing in Brooklyn, and Far Rockaway, New York, respectively. First Nationwide is informed and believes, and on that basis alleges, that defendants Sol Gross (a/k/a Eugene Gross) and Joseph Friedman are, and at all times relevant to this complaint were, general partners of defendant 1691 Eastburn Realty Co.

32. First Nationwide is informed and believes, and on that basis alleges, that defendant 1261 Central Avenue Owners Corp. is, and at all times relevant to this complaint was, a company incorporated in New York with its principal place of business in Brooklyn, New York.

33. First Nationwide is informed and believes, and on that basis alleges, that defendant 65-11 Realty Co. is, and at all times relevant to this complaint was, a New York general partnership with its principal place of business in Brooklyn, New York, a shareholder of defendant 1261 Central Avenue Owners Corp.

34. First Nationwide is informed and believes, and on that basis alleges, that defendants Aviezier Cohen and Elaine Cohen

are, and at all times relevant to this complaint were, individuals residing in Brooklyn, New York, and husband and wife. First Nationwide is informed and believes, and on that basis alleges, that defendants Aviezier Cohen and Elaine Cohen are, and at all times relevant to this complaint were, general partners of defendant 65-11 Realty Co. Further, First Nationwide is informed and believes, and on that basis alleges, that defendants Aviezier Cohen and Elaine Cohen hold or have held interests in many entities that obtained Gelt Loans; that defendants Aviezier Cohen and Elaine Cohen, together with defendants Gross and Esther Shur, provided secondary financing to First Nationwide borrowers in knowing violation of those borrowers' loan agreements with First Nationwide; and that defendants Aviezier Cohen and Elaine Cohen, together with defendants Esther Shur and Robert Wolf, were involved in "flipping" properties to First Nationwide borrowers at substantial premiums above the price received by the seller of the property; and that defendant Herzka participated with defendants Aviezier and Elain Cohen, Shur and Wolf in many of these activities. First Nationwide is informed and believes, and on that basis alleges, that defendant Aviezier Cohen was an unindicted co-conspirator in *United States of America v. Melvin Miller and Jay Adolf*, Case No. CR-90-1044, United States District Court for the Eastern District of New York, in which the jury found, among other things, that defendant Aviezier Cohen conspired with the defendants in that case to defraud a number of people in connection with various real estate transactions. First Nationwide is informed and believes, and on that basis alleges, that defendant Aviezier Cohen admitted to crimes of fraud and income tax evasion in connection with those transactions but received immunity in return for testimony against the defendants concerning his and their fraudulent activities. First Nationwide is informed and believes, and on that basis alleges, that Esther Shur, who is a defendant in the action now before this Court, was a business associate of defendant Aviezier Cohen and was identified in the criminal indictment in the above-referenced case as an

individual involved in at least one real estate fraud with defendant Aviezier Cohen.

35. First Nationwide is informed and believes, and on that basis alleges, that defendant 730 Realty Associates is, and at all times relevant to this complaint was, a New York general partnership with its principal place of business in Brooklyn, New York.

36. First Nationwide is informed and believes, and on that basis alleges, that defendants David Malek and Peter Rebenwurzel are, and at all times relevant to this complaint were, individuals residing in Brooklyn, New York. First Nationwide is informed and believes, and on that basis alleges, that defendants David Malek and Peter Rebenwurzel are, and at all times relevant to this complaint were, general partners of defendant 730 Realty Associates.

37. First Nationwide is informed and believes, and on that basis alleges, that defendant 36 Plaza Street Owners Corp. is, and at all times relevant to this complaint was, a company incorporated in New York with its principal place of business in Brooklyn, New York.

38. First Nationwide is informed and believes, and on that basis alleges, that defendant Robert Wolf is, and at all times relevant to this complaint was, an individual residing in Brooklyn, New York, and a business associate of defendant Aviezier Cohen.

39. First Nationwide is informed and believes, and on that basis alleges, that defendant 350 Sterling Associates is, and at all times relevant to this complaint was, a New York general partnership with its principal place of business in Brooklyn, New York.

40. First Nationwide is informed and believes, and on that basis alleges, that defendant Edith Gross is, and at all times relevant to this complaint was, an individual residing in Brooklyn, New York, and the wife of defendant Gross. First Nationwide is informed and believes, and on that basis alleges, that defendants Gross and Edith Gross are, and at all times relevant to this complaint were, general partners of defendant 350 Sterling Associates.

41. First Nationwide is informed and believes, and on that basis alleges, that defendant Brookhaven Realty Associates is, and at all times relevant to this complaint was, a New York general partnership with its principal place of business in Brooklyn, New York.

42. First Nationwide is informed and believes, and on that basis alleges, that defendants Gross and Edith Gross are, and at all times relevant to this complaint were, general partners of defendant Brookhaven Realty Associates.

43. First Nationwide is informed and believes, and on that basis alleges, that defendant Crown Equities Limited Partnership is, and at all times relevant to this complaint was, a Delaware limited partnership with its principal place of business in Brooklyn, New York.

44. First Nationwide is informed and believes, and on that basis alleges, that defendant Adar Two Realty Co. is, and at all times relevant to this complaint was, a New York general partnership with its principal place of business in Brooklyn, New York.

45. First Nationwide is informed and believes, and on that basis alleges, that defendants Joseph Friedman, Sol Gross (a/k/a Eugene Gross), David Malek and Peter Rebenwurzel are, and at all times relevant to this complaint were, general partners of defendant Adar Two Realty Co.

46. First Nationwide is informed and believes, and on that basis alleges, that defendant 100 Realty Company is, and at all times relevant to this complaint was, a New York general partnership with its principal place of business in Brooklyn, New York.

47. First Nationwide is informed and believes, and on that basis alleges, that defendants Esther Shur and E. Phillip Weingarten are, and at all times relevant to this complaint were, individuals residing in Brooklyn, New York, and sister and brother. First Nationwide is informed and believes, and on that basis alleges, that defendants Esther Shur and E. Phillip Weingarten are, and at all times relevant to this complaint were, general partners of defendant 100 Realty Company.

48. First Nationwide is informed and believes, and on that basis alleges, that defendant New Heights (173-174) Limited Partnership is, and at all times relevant to this complaint was, a Delaware limited partnership with its principal place of business in Brooklyn, New York.

49. First Nationwide is informed and believes, and on that basis alleges, that defendant Temple Apartments Management Corporation is, and at all times relevant to this complaint was, a company incorporated in Delaware with its principal place of business in Brooklyn, New York. First Nationwide is informed and believes, and on that basis alleges, that defendant Temple Apartments Management Corporation is, and at all times relevant to this complaint was, the general partner of defendant New Heights (173-174) Limited Partnership.

50. First Nationwide is informed and believes, and on that basis alleges, that defendant 740 Realty Associates is, and at all times relevant to this complaint was, a New York general partnership with its principal place of business in Brooklyn, New York.

51. First Nationwide is informed and believes, and on that basis alleges, that defendants David Malek and Peter Rebenwurzel are, and at all times relevant to this complaint were, the general partners of defendant 740 Realty Associates.

52. First Nationwide is informed and believes, and on that basis alleges, that defendant 2344 Davidson Associates is, and at all times relevant to this complaint was, a New York general partnership with its principal place of business in Brooklyn, New York.

53. First Nationwide is informed and believes, and on that basis alleges, that defendant Jacob Rabinowitz is, and at all times relevant to this complaint was, an individual residing in Brooklyn, New York. First Nationwide is informed and believes, and on that basis alleges, that defendants David Malek, Jacob Rabinowitz, and Peter Rebenwurzel are, and at all times relevant to this complaint were, the general partners of defendant 2344 Davidson Associates.

54. First Nationwide is informed and believes, and on that basis alleges, that defendant 1958 Realty Associates is, and at all times relevant to this complaint was, a New York general partnership with its principal place of business in Brooklyn, New York.

55. First Nationwide is informed and believes, and on that basis alleges, that defendants Menachem Halberstam and Mordechai Halberstam are, and at all times relevant to this complaint were individuals residing in Brooklyn, New York. First Nationwide is informed and believes, and on that basis alleges, that defendants Menachem Halberstam and Mordechai Halberstam are, and at all times relevant to this complaint were, general partners of defendant 1958 Realty Associates.

56. First Nationwide is informed and believes, and on that basis alleges, that defendant 273 Realty Associates is, and at all times relevant to this complaint was, a New York general partnership with its principal place of business in Brooklyn, New York.

57. First Nationwide is informed and believes, and on that basis alleges, that defendants Menachem Halberstam and Mordechai Halberstam are, and at all times relevant to this complaint were, the general partners of defendant 273 Realty Associates.

58. First Nationwide is informed and believes, and on that basis alleges, that defendant 2608 Realty Associates is, and at all times relevant to this complaint was, a New York general partnership with its principal place of business in New York, New York.

59. First Nationwide is informed and believes, and on that basis alleges, that defendants Solomon Werdiger and Esther Werdiger are, and at all times relevant to this complaint were, individuals residing in Brooklyn, New York. First Nationwide is informed and believes, and on that basis alleges, that defendant Solomon Werdiger and Esther Werdiger are, and at all times relevant to this complaint were, the general partners of defendant 2608 Realty Associates.

Fraudulent Loans

60. The Gelt loans were made on a non-recourse basis, such that in the event of a default, First Nationwide would have no recourse to the assets of the borrowers of the Gelt loans other than the property securing the loan, subject to certain exceptions specified in the relevant agreements executed in connection with the loan. In this action, First Nationwide does not seek to recover on the promissory notes delivered by the borrowers of the Gelt loans to First Nationwide

in connection with the Gelt loans, or otherwise to recover any part of the mortgage debt related to the Gelt loans, but only to recover compensatory and other damages proximately caused by the defendants' fraud, violation of RICO, and other tortious conduct in connection with the Gelt loans, as set forth below and elsewhere in this Complaint.

61. In connection with each of the Gelt loans, First Nationwide required that Gelt and the borrower or borrowers provide to First Nationwide complete and accurate information regarding the gross and net operating income of the property securing the loan and the particulars of the purchase transaction (including, specifically, whether it involved a flip, and whether the borrower or borrowers intended to obtain additional financing secured by the property), as a condition to making each of the Gelt loans. First Nationwide would not have made any of the Gelt loans unless it obtained such information and believed that the information provided was accurate and complete.

62. The defendants' and borrowers' misrepresentations regarding the value of the properties securing the Gelt loans and the debt secured by those properties enhanced the risk of default on the Gelt loans and the risk that First Nationwide would not be able to recover the full amount due under the Gelt loans out of its collateral.

63. First Nationwide justifiably and reasonably relied on the false, incomplete, and misleading information provided to it by Gelt and the other defendants. First Nationwide relied on such information in deciding whether to make the fraudulent Gelt Loans, including the loans specifically identified below, and but for the defendants' false representations would not have made the loans, or would have made them on different terms or subject to different conditions. In particular, First Nationwide relied on the false information provided by the defendants in deciding how much to lend against the

collateral properties, and but for the defendants' misrepresentations would have made smaller loans than it did, in those instances where it would have made any loan at all.

64. The properties securing the fraudulent Gelt Loans were worth less at the time the loans were made than they were represented to be worth by Gelt and the other defendants. As a consequence, First Nationwide suffered an injury at the time it made the loan, because the security it received for the loan was inadequate.

65. The value of each of the properties securing the fraudulent Gelt Loans is (or will be before First Nationwide can recover on its security) less than the outstanding amount due on the loan that it secures. As a consequence, First Nationwide has suffered a loss in connection with each of the fraudulent Gelt Loans.

66. The properties securing the fraudulent Gelt Loans were at all times and are today worth less than they would have been worth if the representations of Gelt and the other defendants had been true at the time they were made. Accordingly, some or all of First Nationwide's loss on each of the fraudulent Gelt Loans is the direct and foreseeable consequence of the defendants' fraud.

67. Such losses are not the result of any general decline in the real estate market (1) because First Nationwide would not have made loans as large as it did (if it would have made any loan at all) if it had not been misled by (i) defendants' misrepresentations regarding the gross and net income of the properties securing the loans, (ii) defendants' concealment that properties were being acquired through flip transactions, and (iii) defendants' concealment that they intended to obtain additional financing secured by the properties in violation of their agreements with First Nationwide, and (2) because there would not have been a default on the loans if the gross and net

operating income of the properties securing them had been as represented by the defendants and the defendants had not overleveraged the properties by burdening them with additional financing in violation of their loan agreements with First Nationwide.

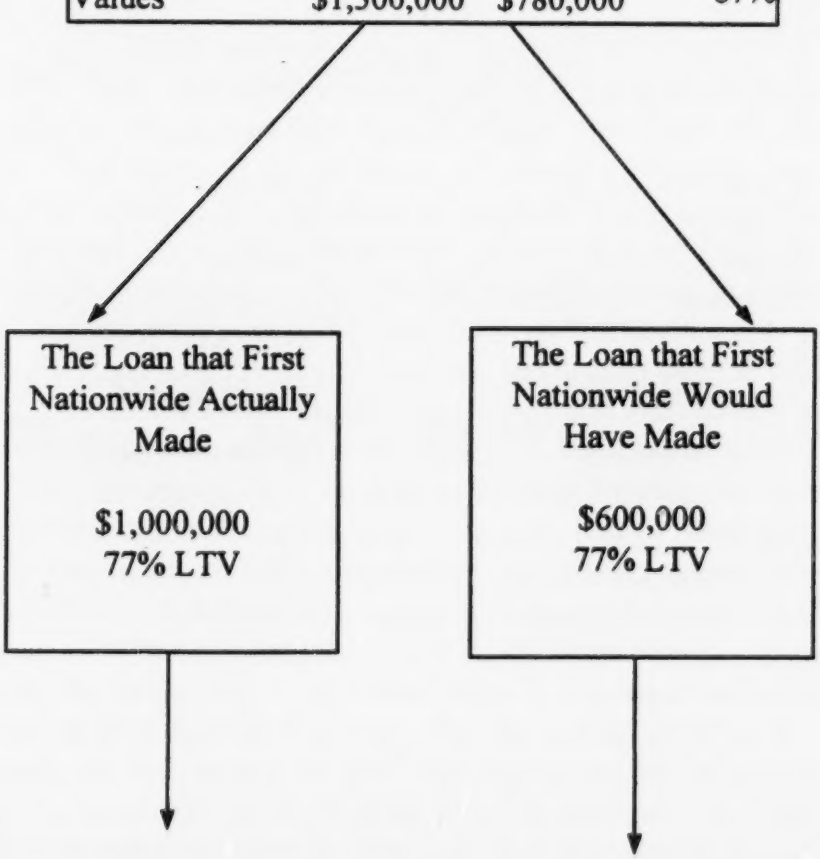
68. First Nationwide is continuing to investigate Gelt Loans, and the catalogue of fraudulent loans set forth below is not intended to be comprehensive. First Nationwide expressly reserves its right to present at trial evidence of fraudulent loans in addition to those identified below; these specific instances of fraud are set forth to illustrate the pattern of fraudulent acts typical of the defendants' conduct of their business affairs with First Nationwide.

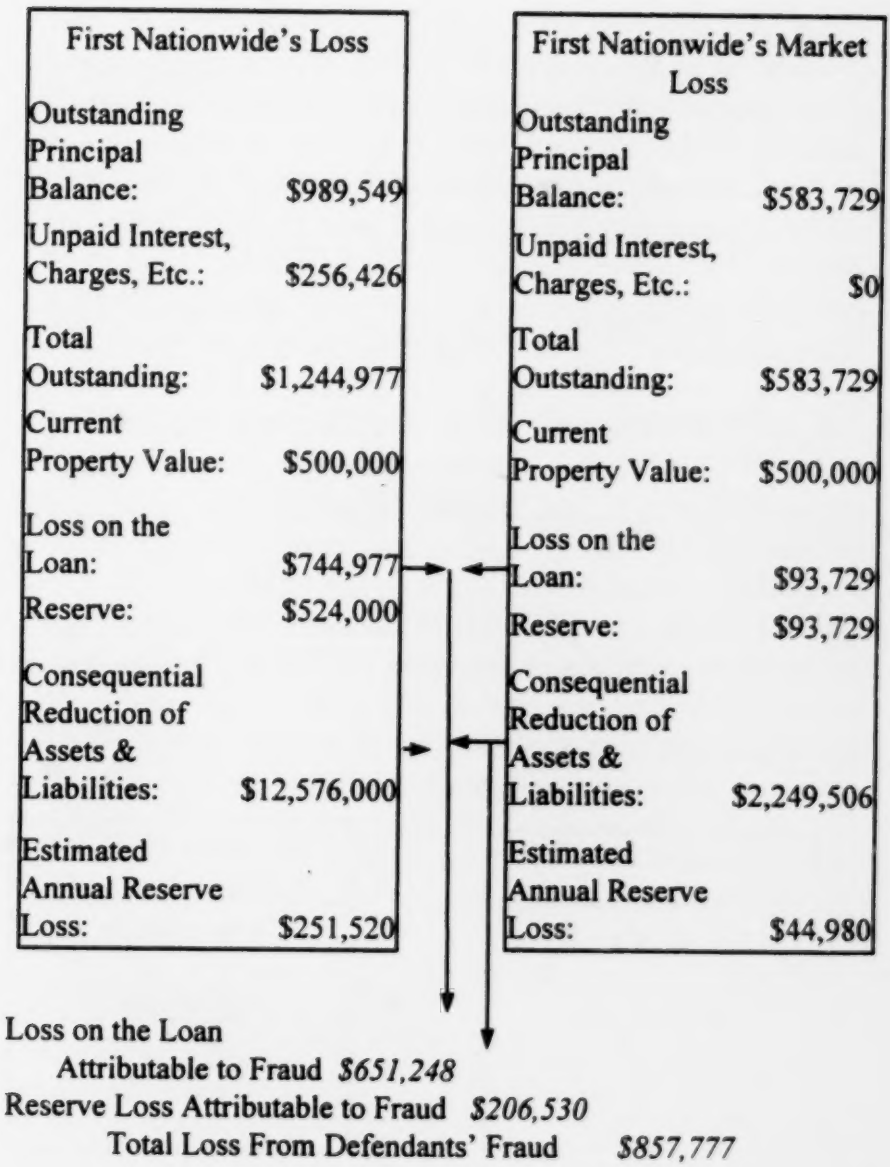
69. Specific information with respect to each of the fraudulent loans specifically described below is provided in Appendix A to this complaint, which is expressly incorporated herein. As set forth in greater detail in Appendix A, Gelt and the defendants overstated the gross income of the properties on average by 31%. This resulted in an average overstatement of the value of the net operating income generated by the properties available to pay debt service by 73%, and an average overstatement of the value of the property of at least 56%. As a consequence, the loans exceeded the maximum acceptable amount, based on the ability of the net operating income to cover debt service (debt service coverage) and the ratio of the property value to the loan amount (the loan-to-value ratio), by at least 64%. The losses on the loans are equal to approximately 32% of the original amount of the loans, and the additional annual reserve losses are equal to approximately 19% of the original amount of the loans. Had the defendants' misrepresentations been true, the average debt service coverage ratio would have been 1.16, and the average loan-to-value ratio 73%; in fact, the actual debt service coverage ratio was only 0.72, and the actual loan-to-value ratio was 1.26%.

70. In estimating its losses attributable to fraud on the loans described below and in Appendix A, First Nationwide used the following methodology to ensure that losses attributable to any general market decline were excluded (the methodology is illustrate in simplified form in the figure below). First Nationwide (1) estimates the actual value of the property at the time the loan was made, based on estimates of the property's true net operating income at the time; (2) estimates the amount that it would have loaned against that property value, based on debt service coverage and loan-to-value lending criteria; (3) determines what it would have lost (if anything) had it made such a loan rather than the loan it did make; (4) compares that with its actual losses to determine what portion of those losses is attributable to market changes and what portion is attributable to the defendants' fraud; then (5) estimates the reserves it would have taken, if any, if it had made the loan knowing the true facts; (6) computes the amount by which it would have had to divest assets and liabilities as a consequence; (7) computes the annual loss it would have incurred as a result; and (8) compares that with annual loss resulting from the reserves that it actually took to determine what portion of the loss is attributable to market changes and what portion is attributable to the defendants' fraud.

DAMAGES ILLUSTRATION
1958 Realty Loan

	Represented	Actual	Variance
Rent Roll	$195,657	$149,483	31%
Expenses	$81,011	$81,011	0%
NOI	$114,646	$68,482	67%
Capitalization Rate	8.82%	8.82%	
Estimated Property Values	$1,300,000	$780,000	67%




First Nationwide's Loss
Outstanding Principal Balance: $989,549
Unpaid Interest, Charges, Etc.: $256,426
Total Outstanding: $1,244,977
Current Property Value: $500,000
Loss on the Loan: $744,977
Reserve: $524,000
Consequential Reduction of Assets & Liabilities: $12,576,000
Estimated Annual Reserve Loss: $251,520
First Nationwide's Market Loss
Outstanding Principal Balance: $583,729
Unpaid Interest, Charges, Etc.: $0
Total Outstanding: $583,729
Current Property Value: $500,000
Loss on the Loan: $93,729
Reserve: $93,729
Consequential Reduction of Assets & Liabilities: $2,249,506
Estimated Annual Reserve Loss: $44,980
Loss on the Loan Attributable to Fraud $651,248
Reserve Loss Attributable to Fraud $206,530
Total Loss From Defendants' Fraud $857,777

71. The 100 Realty Company Loan of December, 1985

(a) On December 13, 1985, First Nationwide made a loan in the amount of $485,000 to defendant 100 Realty Company, a New York general partnership whose general partners were and are defendants Esther Shur and E. Phillip Weingarten, to finance the purchase of a multi-unit apartment building at 100 Clark Street (a/k/a 1 Monroe Place), Brooklyn, New York (the "100 Realty Company Loan"). Gelt acted as the mortgage broker representing 100 Realty Company in connection with the 100 Realty Company Loan.

(b) First Nationwide incorporates herein by reference the allegations of paragraphs 60 through 70, as though set forth in full with respect specifically to the 100 Realty Company Loan.

(c) First Nationwide is informed and believes, and on that basis alleges, that Gelt and defendant 100 Realty Company misrepresented the net operating income ("NOI") for the property securing the 100 Realty Company Loan. On information and belief, First Nationwide alleges that the NOI for the property securing the 100 Realty Company Loan in 1985 was approximately $22,000, that Gelt and defendant knew this, that they misrepresented to First Nationwide that the annual NOI in 1985 was approximately $72,000 (327% of the actual NOI) because they knew that First Nationwide would consider the annual NOI material in valuing the property and in determining whether to make the 100 Realty Company Loan and in determining the amount and other terms of the 100 Realty Company Loan.

(d) In particular, First Nationwide is informed and believes, and on that basis alleges, that the annual gross rental income for the property in 1985 was approximately $65,000, that Gelt and 100 Realty Company knew this and that they misrepresented to First Nationwide that the annual rental

income in 1985 was approximately $115,000 (177% of the actual gross rental income) because they knew that First Nationwide would consider the annual gross rental income material in valuing the property and in determining whether to make the 100 Realty Company Loan and in determining the amount and other terms of the 100 Realty Company Loan.

(e) As a direct, foreseeable and intended consequence of the defendants' deliberate overstatement of gross and net income, the value attributed to the property securing the 100 Realty Company Loan by First Nationwide was significantly greater than the actual value of the property at the time. Based on the information provided by Gelt and 100 Realty Company, First Nationwide concluded that the property located at 100 Clark Street was worth $850,000, and thus that the ratio of the loan amount to the value of the property securing the 100 Realty Company Loan (the "LTV ratio") was approximately 57%, and that the ratio of the property's net operating income to the debt service obligations of 100 Realty Company (the "DSC ratio") was 1.29. In fact, at the time the loan was made, the value of the property securing the loan was approximately $260,000, 69% less than what First Nationwide believed it to be based on the defendants' misrepresentations. As a consequence, the actual LTV and DSC ratios for the loan were approximately 187% and 0.39, respectively.

(f) Had First Nationwide known that the actual value of the property was only approximately $260,000, and that the actual LTV and DSC ratios for the loan were approximately 187% and 0.39, respectively, First Nationwide would not have made the 100 Realty Company Loan. If First Nationwide had known the true facts, the most that First Nationwide would have loaned to 100 Realty Company to finance the purchase of the property located at 100 Clark Street was $170,000.

(g) On or about December 11, 1991, 100 Realty Company failed to make a required payment of principal and interest as required under the loan agreement. As of December 1, 1992, the total amount outstanding on the 100 Realty Company Loan was approximately $551,000, and the amount that would have to be paid to First Nationwide to cure all defaults under the loan and to reinstate the loan was approximately $105,000.

(h) In particular, based on First Nationwide's most recent appraisal of the property located at 100 Clark Street, the value of the property securing the 100 Realty Company Loan is approximately $400,000. Accordingly, First Nationwide had suffered a loss in connection with the 100 Realty Company Loan of approximately $151,000, the difference between the outstanding balance on the 100 Realty Company Loan and the current value of the property securing the 100 Realty Company Loan.

(i) If First Nationwide had known the true facts at the time it made the 100 Realty Company Loan, it would not have suffered this loss, because it would either not have made the loan at all, or would have made a loan of $170,000. Thus, of this loss suffered by First Nationwide on the 100 Realty Company Loan, $151,000, which is equal to the difference between the amount First Nationwide has lost and the amount First Nationwide would have lost in the absence of defendants' fraud, represents the portion of First Nationwide's loss attributable to the defendants' fraud in connection with the 100 Realty Company Loan.

(j) As a consequence of the defendants' fraud, First Nationwide on September 30, 1991 took reserves against the 100 Realty Company Loan in the amount of $84,000. The reserve amount is equal to the outstanding balance due on the 100 Realty Company Loan as of September 30, 1991 (including negative escrow accounts), less the current value of

the property securing the 100 Realty Company Loan. But for defendants' fraud, First Nationwide Bank would have loaned only approximately $170,000, the outstanding balance due on the loan would be not greater than approximately $159,000, and, accordingly, no reserves would have been taken. Thus, of the total reserve taken by First Nationwide on the 100 Realty Company Loan, approximately $84,000, which is equal to the difference between the amount First Nationwide reserved and the amount First Nationwide would have reserved in the absence of defendants' fraud, is the amount of the reserve directly and proximately attributable to the defendants' fraud. First Nationwide was required to reduce its assets and liabilities, to maintain its regulatory base capital requirement of 4% to compensate for the reserve it took on the 100 Realty Company Loan. First Nationwide has incurred and will continue to incur additional losses of approximately $40,000 per annum because of the defendants' fraud.

72. The East 13th Street Associates Loan of May, 1986

(a) On May 20, 1986, First Nationwide made a loan in the amount of $475,000 to 212 East 13th Street Associates, a New York general partnership, to finance the purchase of a multi-unit apartment building at 212-14 East 13th Street, New York, New York (the "East 13th Street Associates Loan"). Gelt acted as the mortgage broker representing 212 East 13th Street Associates in connection with the East 13th Street Associates Loan.

(b) First Nationwide incorporates herein by reference the allegations of paragraph 60 through 70, as though set forth in full with respect to the East 13th Street Associates Loan.

(c) First Nationwide is informed and believes, and on that basis alleges, that Gelt and 212 East 13th Street Associates misrepresented the net operating income ("NOI") for the property securing the East 13th Street Associates Loan. On

information and belief, First Nationwide alleges that the NOI for the property securing the East 13th Street Associates Loan in 1986 was approximately $29,000, that Gelt and 212 East 13th Street Associates knew this, that they misrepresented to First Nationwide that the annual NOI in 1986 was approximately $69,000, (236% of the actual NOI) because they knew that First Nationwide would consider the annual NOI material in valuing the property and in determining whether to make the East 13th Street Associates Loan and in determining the amount and other terms of the East 13th Street Associates Loan.

(d) In particular, First Nationwide is informed and believes, and on that basis alleges, that the annual gross rental income for the property in 1986 was approximately $81,000, that Gelt and 212 East 13th Street Associates knew this and that they misrepresented to First Nationwide that the annual gross rental income in 1986 was approximately $111,000 (137% of the actual gross rental income) because they knew that First Nationwide would consider the annual gross rental income material in valuing the property and in determining whether to make the East 13th Street Associates Loan and in determining the amount and other terms of the East 13th Street Associates Loan.

(e) Furthermore, First Nationwide is informed and believes, and on that basis alleges, that the annual operating expenses for the property securing the East 13th Street Associates Loan were approximately $52,000, that Gelt and 212 East 13th Street Associates knew this and that they misrepresented to First Nationwide that the annual operating expenses in 1986 were approximately $42,000 because they knew that First Nationwide would consider the annual operating expenses material in valuing the property and in determining whether to make the East 13th Street Associates Loan and in determining the amount and other terms of the East 13th Street Associates Loan.

(f) As a direct, foreseeable and intended consequence of the defendants' deliberate overstatement of gross and net income, the value attributed to the property securing the East 13th Street Associates Loan by First Nationwide was significantly greater than the actual value of the property at the time. Based on the information provided by Gelt and 212 East 13th Street Associates, First Nationwide concluded that the property located at 212-14 East 13th Street, New York, New York was worth $700,000, and thus that the ratio of the loan amount to the value of the property securing the East 13th Street Associates Loan (the "LTV ratio") was approximately 68%, and that the ratio of the property's net operating income to the debt service obligations of 212 East 13th Street Associates (the "DSC ratio") was 1.28. In fact, at the time the loan was made, the value of the property securing the loan was approximately $300,000, 57% less than what First Nationwide believed it to be based on the defendants' misrepresentations. As a consequence, the actual LTV and DSC ratios for the loan were 158% and 0.54 respectively.

(g) Had First Nationwide known that the actual value of the property was only $300,000, and that the actual LTV and DSC ratios for the loan were 158% and 0.54, respectively, First Nationwide would not have made the East 13th Street Associates Loan. If First Nationwide had known the true facts, the most that First Nationwide would have loaned to 212 East 13th Street Associates to finance the purchase of the property located at 212-14 East 13th Street, New York, New York was $210,000.

(h) After the 212 East 13th Street Associates Loan went into default, First Nationwide restructured the loan at a loss to First Nationwide of approximately $81,000.

(i) If First Nationwide had known the true facts at the time it made the loan, it would not have suffered any of this $81,000 loss, because it would either not have made the loan

at all, or would have made a loan of $210,000 which would not have gone into default and would not have been restructured at a loss to First Nationwide, because the current value of the property is estimated to be $500,000.

(j) As a consequence of First Nationwide's loss on the East 13th Street Associates Loan, First Nationwide was required to reduce its assets and liabilities in order to maintain its regulatory capital base requirement of 4%, and, accordingly, First Nationwide has incurred and will continue to incur additional losses of approximately $159,000 per annum because of defendants' fraud.

73. The West 34th Street Associates Loan of December, 1986

(a) On December 8, 1986, First Nationwide made a loan in the amount of $4,000,000 to 455 West 34th Street Associates, a New York general partnership whose general partners include defendants David Malek and Peter Rebenwurzel, to finance the purchase of a multi-unit apartment building at 455 West 34th Street, New York, New York (the "West 34th Street Associates Loan"). Gelt acted as the mortgage broker representing 455 West 34th Street Associates in connection with the West 34th Street Associates Loan.

(b) First Nationwide incorporates herein by reference the allegations of paragraphs 60 through 70, as though set forth in full with respect specifically to the West 34th Street Associates Loan.

(c) First Nationwide is informed and believes, and on that basis alleges, that Gelt and defendants misrepresented the net operating income ("NOI") for the property securing the West 34th Street Associates Loan. On information and belief, First Nationwide alleges that the NOI for the property securing the West 34th Street Associates Loan in 1986 was approximately $273,000, that Gelt and defendants knew this, that they

misrepresented to First Nationwide that the annual NOI in 1986 was approximately $443,000 (162% of the actual NOI), because they knew that First Nationwide would consider the annual NOI material in valuing the property and in determining whether to make the West 34th Street Associates Loan and in determining the amount and other terms of the West 34th Street Associates Loan.

(d) In particular, First Nationwide is informed and believes, and on that basis alleges, that the annual gross rental income for the property in 1986 was approximately $615,000, that Gelt and defendants knew this and that they misrepresented to First Nationwide that the annual gross rental income in 1986 was approximately $785,000 (128% of the actual income) because they knew that First Nationwide would consider the annual gross rental income material in valuing the property and in determining whether to make the West 34th Street Associates Loan and in determining the amount and other terms of the West 34th Street Associates Loan.

(e) As a direct, foreseeable and intended consequence of the defendants' deliberate overstatement of gross and net income, the value attributed to the property securing the West 34th Street Associates Loan by First Nationwide was significantly greater than the actual value of the property at the time. Based on the information provided by Gelt and 455 West 34th Street Associates, First Nationwide concluded that the property located at 455 West 34th Street, New York, New York was worth $5,000,000, and thus that the ratio of the loan amount to the value of the property securing the West 34th Street Associates Loan (the "LTV ratio") was 80%, and that the ratio of the property's net operating income to the debt service obligations of 455 West 34th Street Associates (the "DSC ratio") was 0.97. In fact, at the time the loan was made, the value of the property securing the loan was approximately $3,080,000, 38% less than what First Nationwide believed it to be based on the defendants' misrepresentations. As a

consequence, the actual LTV and DSC ratios for the loan were approximately 130% and 0.60 respectively.

(f) Had First Nationwide known that the actual value of the property was only approximately $3,080,000, and that the actual LTV and DSC ratios for the loan were 130% and 0.60, respectively, First Nationwide would not have made the West 34th Street Associates Loan. If First Nationwide had known the true facts, the most that First Nationwide would have loaned to 455 West 34th Street Associates to finance the purchase of the property located at 455 West 34th Street, New York, New York was $2,460,000.

(g) On or about May 11, 1990, 455 West 34th Street Associates failed to make a required payment of principal and interest as required under the loan agreement. As of December 1, 1992, the total amount outstanding on the West 34th Street Associates Loan was approximately $4,872,000, and the amount that would have to be paid to First Nationwide to cure all defaults under the loan and to reinstate the loan was approximately $1,124,000.

(h) In particular, based on First Nationwide's most recent appraisal of the property located at 455 West 34th Street, New York, New York, the value of the property securing the West 34th Street Associates Loan is approximately $3,000,000. Accordingly, First Nationwide has suffered a loss in connection with the West 34th Street Associates Loan of approximately $1,872,000, the difference between the outstanding balance on the West 34th Street Associates Loan and the current value of the property securing the West 34th Street Associates Loan. If First Nationwide had known the true facts at the time it made the loan, it would not have suffered at least approximately $1,872,000 of this loss, because it would either not have made the loan at all, or would have made a loan of $2,460,000. Thus, of this loss suffered by First Nationwide on the West 34th Street Associates Loan, $1,872,000, which is

equal to the difference between the amount First Nationwide has lost and the amount First Nationwide would have lost in the absence of defendants' fraud, represents the portion of First Nationwide's loss attributable to the defendants' fraud in connection with the West 34th Street Associates Loan.

(i) As a consequence of defendants' fraud, First Nationwide on September 30, 1991 took reserves against the West 34th Street Associates Loan in the amount of $862,000. The reserve amount is equal to the outstanding balance due on the West 34th Street Associates Loan as of September 30, 1991 (including negative escrow accounts), less the estimated current value of the property securing the West 34th Street Associates Loan. But for defendants' fraud, First Nationwide Bank would have loaned only approximately $2,460,000, the outstanding balance due on the loan would be not greater than approximately $2,374,000, and, accordingly, no reserves would have been taken. Thus, of the total reserve taken by First Nationwide on the West 34th Street Associates Loan, approximately $862,000, which is equal to the difference between the amount First Nationwide reserved and the amount First Nationwide would have reserved in the absence of defendants' fraud, is the amount of the reserve directly and proximately attributable to the defendants' fraud. First Nationwide was required to reduce its assets and liabilities, to maintain its regulatory base capital at 4%, to compensate for the reserve it took on the West 34th Street Associates Loan. First Nationwide has incurred and will continue to incur additional losses of approximately $414,000 per annum because of defendants' fraud.

74. The 4395 Broadway Owners Loan of April, 1987

(a) On April 9, 1987, First Nationwide made a loan in the amount of $1,500,000 to 4395 Broadway Owners Corp., a New York corporation, to finance the purchase of a multi-unit apartment building at 4395 Broadway, New York, New York

(the "4395 Broadway Owners Loan"). Gelt acted as the mortgage broker representing 4395 Broadway Owners Corp. in connection with the 4395 Broadway Owners Loan.

(b) First Nationwide incorporates herein by reference the allegations of paragraphs 60 through 70, as though set forth in full with respect specifically to the 4395 Broadway Owners Loan.

(c) First Nationwide is informed and believes, and on that basis alleges, that Gelt and 4395 Broadway Owners Corp. misrepresented the net operating income ("NOI") for the property securing the 4395 Broadway Owners Loan. On information and belief, First Nationwide alleges that the NOI for the property securing the 4395 Broadway Owners Loan in 1987 was approximately $111,000, that Gelt and 4395 Broadway Owners Corp. knew this, that they misrepresented to First Nationwide that the annual NOI in 1987 was approximately $228,000 (207% of the actual NOI), because they knew that First Nationwide would consider the annual NOI material in valuing the property and in determining whether to make the 4395 Broadway Owners Loan and in determining the amount and other terms of the 4395 Broadway Owners Loan.

(d) In particular, First Nationwide is informed and believes, and on that basis alleges, that the annual gross rental income for the property in 1987 was approximately $200,000, that Gelt and 4395 Broadway Owners Corp. knew this and that they misrepresented to First Nationwide that the annual gross rental income in 1987 was approximately $318,000 (159% of the actual income) because they knew that First Nationwide would consider the annual gross rental income material in valuing the property and in determining whether to make the 4395 Broadway Owners Loan and in determining the amount and other terms of the 4395 Broadway Owners Loan.

(e) As a direct, foreseeable and intended consequence of the defendants' deliberate overstatement of gross and net income, the value attributed to the property securing the 4395 Broadway Owners Loan by First Nationwide was significantly greater than the actual value of the property at the time. Based on the information provided by Gelt and 4395 Broadway Owners Corp., First Nationwide concluded that the property located at 4395 Broadway, New York was worth $2,000,000, and thus that the ratio of the loan amount to the value of the property securing the 4395 Broadway Owners Loan (the "LTV ratio") was 75%, and that the ratio of the property's net operating income to the debt service obligations of 4395 Broadway Owners Corp. (the "DSC ratio") was 1.54. In fact, at the time the loan was made, the value of the property securing the loan was approximately $970,000, 52% less than what First Nationwide believed it to be based on the defendants' misrepresentations. As a consequence, the actual LTV and DSC ratios for the loan were approximately 155% and 0.65 respectively.

(f) Had First Nationwide known that the actual value of the property was only $970,000, and that the actual LTV and DSC ratios for the loan were approximately 155% and 0.65, respectively, First Nationwide would not have made the 4395 Broadway Owners Loan. If First Nationwide had known the true facts, the most that First Nationwide would have loaned to 4395 Broadway Owners Corp. to finance the purchase of the property located at 4395 Broadway, New York was $730,000.

(g) After the 4395 Broadway Owners Corp. Loan went into default, First Nationwide sold the 4395 Broadway Owners Loan to a third party at a loss to First Nationwide of approximately $519,000.

(h) If First Nationwide had known the true facts at the time it made the 4395 Broadway Owners Loan, it would have

suffered none of this loss, because it would either not have made the loan at all, or would have made a loan of approximately $730,000 which would not have gone into default or have been sold at a loss since the current property value of $1,325,000 is greater than the amount of the loan First Nationwide would have made.

(i) As a consequence of First Nationwide's loss on the 4395 Broadway Owners Loan, First Nationwide was required to reduce its assets and liabilities in order to maintain its regulatory base capital requirement of 4%, and, as a consequence of this reduction, First Nationwide has incurred and will continue to incur additional losses of approximately $461,000 per annum as a result of defendants' fraud.

75. The Marlborough Associates Loan of August, 1987

(a) On August 11, 1987, First Nationwide made a loan in the amount of $725,000 to 625 Marlborough Associates, a New York limited partnership, to refinance mortgages on a multi-unit apartment building at 625 Marlborough Road, Brooklyn, New York (the "Marlborough Associates Loan"). Gelt acted as the mortgage broker representing 625 Marlborough Associates in connection with the Marlborough Associates Loan.

(b) First Nationwide incorporates herein by reference the allegations of paragraphs 60 through 70, as though set forth in full with respect specifically to the Marlborough Associates Loan.

(c) First Nationwide is informed and believes, and on that basis alleges, that Gelt and 625 Marlborough Associates misrepresented the net operating income ("NOI") for the property securing the Marlborough Associates Loan. On information and belief, First Nationwide alleges that the NOI for the property securing the Marlborough Associates Loan in 1987 was

approximately $74,000, that Gelt and 625 Marlborough Associates knew this, that they misrepresented to First Nationwide that the annual NOI in 1987 was approximately $98,000 (133% of the actual NOI), because they knew that First Nationwide would consider the annual NOI material in valuing the property and in determining whether to make the Marlborough Associates Loan and in determining the amount and other terms of the Marlborough Associates Loan.

(d) In particular, First Nationwide is informed and believes, and on that basis alleges, that the annual gross rental income for the property in 1987 was approximately $121,000, that Gelt and 625 Marlborough Associates knew this and that they misrepresented to First Nationwide that the annual gross rental income in 1987 was approximately $145,000 (118% of the actual income) because they knew that First Nationwide would consider the annual gross rental income material in valuing the property and in determining whether to make the Marlborough Associates Loan and in determining the amount and other terms of the Marlborough Associates Loan.

(e) As a direct, foreseeable and intended consequence of the defendants' deliberate overstatement of gross and net income, the value attributed to the property securing the Marlborough Associates Loan by First Nationwide was significantly greater than the actual value of the property at the time. Based on the information provided by Gelt and 625 Marlborough Associates, First Nationwide concluded that the property located at 625 Marlborough Road, Brooklyn, New York was worth $1,100,000, and thus that the ratio of the loan amount to the value of the property securing the Marlborough Associates Loan (the "LTV ratio") was approximately 66%, and that the ratio of the property's net operating income to the debt service obligations of 625 Marlborough Associates (the "DSC ratio") was 1.18. In fact, at the time the loan was made, the value of the property securing the loan was approximately $830,000, 25% less than what First Nationwide believed it to

be based on the defendants' misrepresentations. As a consequence, the actual LTV and DSC ratios for the loan were 87% and 0.89 respectively.

(f) Had First Nationwide known that the actual value of the property was only $830,000 and that the actual LTV and DSC ratios for the loan were 87% and 0.89, respectively, First Nationwide would not have made the Marlborough Associates Loan. If First Nationwide had known the true facts, the most that First Nationwide would have loaned to 625 Marlborough Associates to refinance the property located at 625 Marlborough Road, Brooklyn, New York was $560,000.

(g) After the Marlborough Associates Loan went into default, First Nationwide restructured the Marlborough Associates Loan at a loss of approximately $91,000.

(h) If First Nationwide had known the true facts at the time that it made the Marlborough Associates Loan, it would not have suffered any of the $91,000 loss, because it would either not have made the loan at all, or would have made a loan of approximately $560,000, which would not have gone into default and would not have been restructured at a loss to First Nationwide because the current value of the property securing the loan is estimated to be $515,000.

(i) As a consequence of First Nationwide's loss on the Marlborough Associates Loan, First Nationwide was required on September 30, 1991 to reduce its assets and liabilities in order to maintain its regulatory base capital requirement of 4%, and, as a consequence of this reduction, First Nationwide has incurred and will continue to incur additional losses of approximately $179,000 per annum as a result of defendants' fraud.

76. The 43rd Owners Loan of September, 1987

(a) On September 2, 1987, First Nationwide made a loan in the amount of $1,500,000 to 43-25 43rd Owners Corporation, a New York corporation, to finance the purchase of a multi-unit apartment building at 43-25 43rd Street, Queens, New York (the "43rd Owners Loan"). Gelt acted as the mortgage broker representing 43-25 43rd Owners Corporation in connection with the 43rd Owners Loan.

(b) First Nationwide incorporates herein by reference the allegations of paragraphs 60 through 70, as though set forth in full with respect specifically to the 43rd Owners Loan.

(c) First Nationwide is informed and believes, and on that basis alleges, that Gelt and 43-25 43rd Owners Corporation misrepresented the net operating income ("NOI") for the property securing the 43rd Owners Loan. On information and belief, First Nationwide alleges that the NOI for the property securing the 43rd Owners Loan in 1987 was approximately $79,000, that Gelt and 43-25 43rd Owners Corporation knew this, that they misrepresented to First Nationwide that the annual NOI in 1987 was approximately $175,000 (221% of the actual NOI) because they knew that First Nationwide would consider the annual NOI material in valuing the property and in determining whether to make the 43rd Owners Loan and in determining the amount and other terms of the 43rd Owners Loan.

(d) In particular, First Nationwide is informed and believes, and on that basis alleges, that the annual gross rental income for the property in 1987 was approximately $202,000, that Gelt and 43-25 43rd Owners Corporation knew this and that they misrepresented to First Nationwide that the annual gross rental income in 1987 was approximately $297,000 (148% of the actual income) because they knew that First Nationwide would consider the annual gross rental income

material in valuing the property and in determining whether to make the 43rd Owners Loan and in determining the amount and other terms of the 43rd Owners Loan.

(e) As a direct, foreseeable and intended consequence of the defendants' deliberate overstatement of gross and net income the value attributed to the property securing the 43rd Owners Loan by First Nationwide was significantly greater than the actual value of the property at the time. Based on the information provided by Gelt and 43-25 43rd Owners Corporation, First Nationwide concluded that the property located at 43-25 43rd Street, Queens, New York was worth $2,000,000, and thus that the ratio of the loan amount to the value of the property securing the 43rd Owners Loan (the "LTV ratio") was 75%, and that the ratio of the property's net operating income to the debt service obligations of 43-25 43rd Owners Corporation (the "DSC ratio") was 1.02. In fact, at the time the loan was made, the value of the property securing the loan was approximately $910,000, 55% less than what First Nationwide believed it to be based on the defendants' misrepresentations. As a consequence, the actual LTV and DCS ratios for the loan were 165% and 0.46 respectively.

(f) Had First Nationwide known that the actual value of the property was only $910,000, and that the actual LTV and DSC ratios for the loan were 165% and 0.46, respectively, First Nationwide would not have made the 43rd Owners Loan. If First Nationwide had known the true facts, the most that First Nationwide would have loaned to 43-25 43rd Owners Corporation to finance the purchase of the property located at 43-25 43rd Street, Queens, New York was $680,000.

(g) After the 43-25 43rd Owners Loan went into default, First Nationwide sold the 43rd Owners Loan to a third party at a loss to First Nationwide of approximately $529,000.

(h) If First Nationwide had known the true facts at the time that it made the 43rd Owners Loan, it would not have suffered any of this $529,000 loss, because it would either not have made the loan at all, or would have made a loan of approximately $680,000, which would not have gone into default and would not have been sold at a loss since the current property value is $560,000 greater than the loan First Nationwide would have made.

(i) As a consequence of First Nationwide's loss on the 43rd Owners Loan, First Nationwide was required to reduce its assets and liabilities in order to maintain its regulatory base capital requirement of 4%, and, as a consequence of this reduction, First Nationwide has incurred and will continue to incur additional losses of approximately $705,602 per annum as a result of defendants' fraud.

77. The Ditmas Garden Associates Loan of September, 1987

(a) On September 14, 1987, First Nationwide made a loan in the amount of $1,100,000 to Ditmas Gardens Associates, a New York limited partnership, to finance the purchase of a multi-unit apartment building at 105-131 East 86th Street, New York (the "Ditmas Garden Associates Loan"). Gelt acted as the mortgage broker representing Ditmas Gardens Associates in connection with the Ditmas Garden Associates Loan.

(b) First Nationwide incorporates herein by reference the allegations of paragraphs 60 through 70, as though set forth in full with respect specifically to the Ditmas Garden Associates Loan.

(c) First Nationwide is informed and believes, and on that basis alleges, that Gelt and Ditmas Garden Associates misrepresented the net operating income ("NOI") for the property securing the Ditmas Garden Associates Loan. On information and belief, First Nationwide alleges that the NOI for the

property securing the Ditmas Garden Associates Loan in 1987 was approximately $66,000, that Gelt and Ditmas Garden Associates knew this, that they misrepresented to First Nationwide that the annual NOI in 1987 was approximately $144,000 (218% of the actual NOI) because they knew that First Nationwide would consider the annual NOI material in valuing the property and in determining whether to make the Ditmas Garden Associates Loan and in determining the amount and other terms of the Ditmas Garden Associates Loan.

(d) In particular, First Nationwide is informed and believes, and on that basis alleges, that the annual gross rental income for the property in 1987 was approximately $164,000, that Gelt and Ditmas Garden Associates knew this and that they misrepresented to First Nationwide that the annual gross rental income in 1987 was approximately $242,000 (148% of the actual income) because they knew that First Nationwide would consider the annual gross rental income material in valuing the property and in determining whether to make the Ditmas Garden Associates Loan and in determining the amount and other terms of the Ditmas Garden Associates Loan.

(e) As a direct, foreseeable and intended consequence of the defendants' deliberate overstatement of gross and net income, the value attributed to the property securing the Ditmas Garden Associates Loan by First Nationwide was significantly greater than the actual value of the property at the time. Based on the information provided by Gelt and Ditmas Garden Associates, First Nationwide concluded that the property located at 105-131 East 86th Street, New York was worth $1,450,000, and thus that the ratio of the loan amount to the value of the property securing the Ditmas Garden Associates Loan (the "LTV ratio") was approximately 76%, and that the ratio of the property's net operating income to the debt service obligations of Ditmas Garden Associates (the "DSC ratio")

was approximately 1.15. In fact, at the time the loan was made, the value of the property securing the loan was approximately $660,000, 54% less than what First Nationwide believed it to be based on the defendants' misrepresentations. As a consequence, the actual LTV and DSC ratios for the loan were approximately 167% and 0.52 respectively.

(f) Had First Nationwide known that the actual value of the property was only $660,000, and that the actual LTV and DSC ratios for the loan were 167% and 0.52%, respectively, First Nationwide would not have made the Ditmas Garden Associates Loan. If First Nationwide had known the true facts, the most that First Nationwide would have loaned to Ditmas Garden Associates to finance the purchase of the property located at 105-131 East 86th Street, New York was $500,000.

(g) After the Ditmas Garden Associates Loan went into default, First Nationwide restructured the Ditmas Garden Associates Loan at a loss to First Nationwide of approximately $96,000.

(h) If First Nationwide had known the true facts at the time that it made the Ditmas Garden Associates Loan, it would not have suffered any of this $96,000 loss because it would either not have made the loan at all, or would have made a loan of approximately $500,000, which would not have gone into default and would not have been restructured at a loss because the current property value is estimated to be $1,000,000.

(i) As a consequence of First Nationwide's loss on the Ditmas Garden Associates Loan, First Nationwide was required to reduce its assets and liabilities in order to maintain its regulatory capital base requirement of 4%, and, accordingly, has incurred additional losses of approximately $187,000 per annum as a result of defendants' fraud.

78. The New Heights (173-174) Limited Partnership Loan of November, 1987

(a) On November 19, 1987, First Nationwide made a loan in the amount of $4,000,000 to defendant New Heights (173-174) Limited Partnership, a Delaware limited partnership whose general partner was and is defendant Temple Apartments Management Corporation, to refinance existing mortgages on a multi-unit apartment building at 629-639 West 173rd Street, and 636 West 174th Street, New York, New York (the "New Heights (173-174) Limited Partnership Loan"). Gelt acted as the mortgage broker representing New Heights (173-174) Limited Partnership in connection with the New Heights (173-174) Limited Partnership Loan.

(b) First Nationwide incorporates herein by reference the allegations of paragraphs 60 through 70, as though set forth in full with respect specifically to the New Heights (173-174) Limited Partnership Loan.

(c) First Nationwide is informed and believes, and on that basis alleges, that Gelt and New Heights 173-174 Limited Partnership misrepresented the net operating income ("NOI") for the property securing the New Heights 173-174 Limited Partnership Loan. On information and belief, First Nationwide alleges that the NOI for the property securing the New Heights 173-174 Limited Partnership Loan in 1987 was approximately $327,000, that Gelt and New Heights 173-174 Limited Partnership knew this, that they misrepresented to First Nationwide that the annual NOI in 1987 was approximately $472,000 (144% of the actual NOI) because they knew that First Nationwide would consider the annual NOI material in valuing the property and in determining whether to make the New Heights 173-174 Limited Partnership Loan and in determining the amount and other terms of the New Heights 173-174 Limited Partnership Loan.

(d) In particular, First Nationwide is informed and believes, and on that basis alleges, that the annual gross rental income for the property in 1987 was approximately $723,000, that Gelt and New Heights 173-174 Limited Partnership knew this and that they misrepresented to First Nationwide that the annual gross rental income in 1987 was approximately $868,000 (120% of the actual income) because they knew that First Nationwide would consider the annual gross rental income material in valuing the property and in determining whether to make the New Heights 173-174 Limited Partnership Loan and in determining the amount and other terms of the New Heights 173-174 Limited Partnership Loan.

(e) As a direct, foreseeable and intended consequence of the defendants' deliberate overstatement of gross and net income, the value attributed to the property securing the New Heights 173-174 Limited Partnership Loan by First Nationwide was significantly greater than the actual value of the property at the time. Based on the information provided by Gelt and New Heights 173-174 Limited Partnership, First Nationwide concluded that the property located at 629-639 West 173rd Street and 636 West 174th Street, New York, New York was worth $5,350,000 and thus that the ratio of the loan amount to the value of the property securing the New Heights 173-174 Limited Partnership Loan (the "LTV ratio") was approximately 75%, and that the ratio of the property's net operating income to the debt service obligations of New Heights 173-174 Limited Partnership (the "DSC ratio") was approximately 1.4. In fact, at the time the loan was made, the value of the property securing the loan was approximately $3,710,000, 31% less than what First Nationwide believed it to be based on the defendants' misrepresentations. As a consequence, the actual LTV and DSC ratios for the loan were approximately 108% and 0.98 respectively.

(f) Had First Nationwide known that the actual value of the property was only $3,710,000, and that the actual LTV

and DSC ratios for the loan were approximately 108% and 0.98, respectively, First Nationwide would not have made the New Heights 173-174 Limited Partnership Loan. If First Nationwide had known the true facts, the most that First Nationwide would have loaned to New Heights 173-174 Limited Partnership to refinance the property located at 629-639 West 173rd Street and 636 West 174th Street, New York, New York was $2,770,000.

(g) On or about January 1, 1991, New Heights 173-174 Limited Partnership failed to make a required payment of principal and interest as required under the loan agreement. As of December 1, 1992, the total amount outstanding on the New Heights 173-174 Limited Partnership Loan was approximately $4,977,000, and the amount that would have to be paid to First Nationwide to cure all defaults under the loan and to reinstate the loan was approximately $1,097,000.

(h) In particular, based on First Nationwide's most recent appraisal of the property located at 629-639 West 173rd Street and 636 West 174th Street, New York, New York, the value of the property securing the New Heights 173-174 Limited Partnership Loan is approximately $3,700,000. Accordingly, First Nationwide has suffered a loss in connection with the New Heights 173-174 Limited Partnership Loan of approximately $1,277,000, the difference between the outstanding balance on the New Heights 173-174 Limited Partnership Loan and the current value of the property securing the New Heights 173-174 Limited Partnership Loan. If First Nationwide had known the true facts at the time it made the loan, it would not have suffered this loss, because it would either not have made the loan at all, or would have made a loan of $2,770,000. Thus, all of this loss suffered by First Nationwide on the New Heights 173-174 Limited Partnership Loan, the difference between the amount First Nationwide has lost and the estimated amount First Nationwide would have lost in the absence of defendants' fraud, is attributable to the defendants'

fraud in connection with the New Heights 173-174 Limited Partnership Loan.

(i) As a consequence of the defendants' fraud, First Nationwide on September 30, 1991 took reserves against the New Heights 173-174 Limited Partnership Loan in the amount of approximately $416,000. The reserve amount is equal to the outstanding balance due on the New Heights 173-174 Limited Partnership Loan as of September 30, 1991 (including negative escrow accounts), less the estimated current value of the property securing the New Heights 173-174 Limited Partnership Loan. But for defendants' fraud, First Nationwide Bank would have loaned only approximately $2,770,000, the outstanding balance due on the loan would be not greater than approximately $2,714,000, and, accordingly, no reserves would have been taken. Thus, of the reserves taken by First Nationwide on the New Heights 173-174 Limited Partnership Loan, $416,000, equal to the difference between the amount First Nationwide reserved and the amount First Nationwide would have reserved in the absence of defendants' fraud, is directly and proximately attributable to the defendants' fraud. As a consequence of this reduction, First Nationwide has incurred and will continue to incur losses of approximately $200,000 per annum because of the defendants' fraud.

79. The 505 Realty Loan of December, 1987

(a) On December 29, 1987, First Nationwide made a loan in the amount of $1,050,000 to defendant 505 Realty Associates, a New York general partnership whose general partners were and are defendants Shimon Eckstein, Gross, and Herzka, to finance the purchase of a multi-unit apartment building at 505 Ocean Avenue, Brooklyn, New York (the "505 Realty Loan"). Gelt acted as the mortgage broker representing 505 Realty Associates in connection with the 505 Realty Loan.

(b) First Nationwide incorporates herein by reference the allegations of paragraphs 60 through 70, as though set forth in full with respect specifically to the 505 Realty Loan.

(c) First Nationwide is informed and believes, and on that basis alleges, that Gelt and 505 Realty Associates misrepresented the net operating income ("NOI") for the property securing the 505 Realty Loan. On information and belief, First Nationwide alleges that the NOI for the property securing the 505 Realty Loan in 1987 was approximately $121,000, that Gelt and 505 Realty Associates knew this, that they misrepresented to First Nationwide that the annual NOI in 1987 was approximately $144,000 (119% of the actual NOI) because they knew that First Nationwide would consider the annual NOI material in valuing the property and in determining whether to make the 505 Realty Loan and in determining the amount and other terms of the 505 Realty Loan.

(d) In particular, First Nationwide is informed and believes, and on that basis alleges, that the annual gross rental income for the property in 1987 was approximately $206,000, that Gelt and defendant knew this and that they misrepresented to First Nationwide that the annual gross rental income in 1987 was approximately $230,000 (112% of the actual gross rental income) because they knew that First Nationwide would consider the annual gross rental income material in valuing the property and in determining whether to make the 505 Realty Loan and in determining the amount and other terms of the 505 Realty Loan.

(e) First Nationwide is informed and believes, and on that basis alleges, that defendant was buying the property through a flip transaction, that Gelt and 505 Realty Associates knew this, and that they intentionally concealed this fact from First Nationwide because they knew that First Nationwide would consider it material in valuing the property and in determining whether to make the 505 Realty Loan and the amount and

other terms of the 505 Realty Loan. In particular, 505 Realty Associates represented that it was purchasing the collateral property for $1,400,000, though the actual purchase price was $995,000, resulting in a profit to 505 Realty Associates on the flip of $405,000.

(f) As a direct, foreseeable and intended consequence of the defendants' deliberate overstatement of gross and net income and deliberate concealment of the fact that defendant was acquiring the property through a flip transaction, the value attributed to the property securing the 505 Realty Loan by First Nationwide was significantly greater than the actual value of the property at the time. Based on the information provided by Gelt and defendant, First Nationwide concluded that the property located at 505 Ocean Avenue, Brooklyn, New York, was worth $1,450,000, and thus that the ratio of the loan amount to the value of the property securing the 505 Realty Loan (the "LTV ratio") was 72.4%, and that the ratio of the property's net operating income to the debt service obligations of 505 Realty Associates (the "DSC ratio") was 1.64. In fact, at the time the loan was made, the value of the property securing the loan was approximately $1,200,000, 17% less than what First Nationwide believed it to be based on the defendants' misrepresentations. As a consequence, the actual LTV and DSC ratios for the loan were 87.50% and 1.37 respectively.

(g) Had First Nationwide known that the actual value of the property located at 505 Ocean Avenue, Brooklyn was only $1,200,000, and that the actual LTV and DSC ratios for the loan were 87.50% and 1.37, respectively, First Nationwide would not have made the 505 Realty Loan. If First Nationwide had known the true facts, the most that First Nationwide would have loaned to 505 Realty Associates to finance the purchase of the property located at 505 Ocean Avenue, Brooklyn, New York, was $870,000.

(h) On or about July 1, 1990, 505 Realty Associates failed to make a required payment of principal and interest as required under the loan agreement. As of December 1, 1992, the total amount outstanding on the 505 Realty Loan was approximately $1,262,000 and the amount that would have to be paid to First Nationwide to cure all defaults under the loan and to reinstate the loan was approximately $262,000.

(i) In particular, based on First Nationwide's most recent appraisal of the property located at 505 Ocean Avenue, Brooklyn, the value of the property securing the 505 Realty Loan is approximately $1,000,000. Accordingly, First Nationwide has suffered a loss in connection with the 505 Realty Loan of approximately $262,000, the difference between the outstanding balance on the 505 Realty Loan and the current value of the property securing the 505 Realty Loan.

(j) If First Nationwide had known the true facts at the time it made the 505 Realty Loan, it would not have suffered any of this loss, because it would either not have made the loan at all, or would have made a loan of $870,000. Thus, of this loss suffered by First Nationwide on the 505 Realty Loan, $262,000, which is equal to the difference between the amount First Nationwide has lost and the amount First Nationwide would have lost in the absence of defendants' fraud, represents the portion of First Nationwide's loss attributable to the defendants' fraud in connection with the 505 Realty Loan.

(k) As a consequence of defendants' fraud, First Nationwide on September 30, 1991 took reserves against the 505 Realty Loan in the amount of $80,000. The reserve amount is equal to the outstanding balance due on the 505 Realty Loan as of September 30, 1991 (including negative escrow accounts), less the estimated current value of the property securing the 505 Realty Loan. But for defendants' fraud, First Nationwide Bank would have loaned only approximately

$870,000, the outstanding balance due on the loan would be not greater than approximately $897,000, and, accordingly, no reserves would have been taken. Thus, of the reserves taken by First Nationwide on the 505 Realty Loan, $80,000, the difference between the amount First Nationwide reserved and the amount First Nationwide would have reserved in the absence of defendant's fraud, is directly and proximately attributable to the defendants' fraud. As a consequence, First Nationwide was required to reduce its assets and liabilities in order to maintain its regulatory base capital requirement of 4%, and, accordingly, First Nationwide has incurred and will continue to incur additional losses of approximately $38,000 per annum because of the defendants' fraud.

80. The Prospect Realty Loan of December, 1987

(a) On December 29, 1987, First Nationwide made a loan in the amount of $1,600,000 to defendant Prospect Realty Associates, a New York general partnership whose general partners were defendants Juda Wolf, Shimon Eckstein, Gross; Herzka, and Meir Unsdorfer, to finance the purchase of a multi-unit apartment building at 925 Prospect Place, Brooklyn, New York (the "Prospect Realty Loan"). Gelt acted as the mortgage broker representing Prospect Realty Associates in connection with the Prospect Realty Loan.

(b) First Nationwide incorporates herein by reference the allegations of paragraphs 60 through 70, as though set forth in full with respect specifically to the Prospect Realty Loan.

(c) First Nationwide is informed and believes, and on that basis alleges, that Gelt and Prospect Realty Associates misrepresented the net operating income ("NOI") for the property securing the Prospect Realty Loan. On information and belief, First Nationwide alleges that the NOI for the property securing the Prospect Realty Loan in 1987 was approximately $136,000, that Gelt and Prospect Realty Associates knew this,

that they misrepresented to First Nationwide that the annual NOI in 1987 was approximately $195,000 (143% of the actual NOI) because they knew that First Nationwide would consider the annual NOI material in valuing the property and in determining whether to make the Prospect Realty Loan and in determining the amount and other terms of the Prospect Realty Loan.

(d) In particular, First Nationwide is informed and believes, and on that basis alleges, that the annual gross rental income for the property in 1987 was approximately $285,000, that Gelt and Prospect Realty Associates knew this and that they misrepresented to First Nationwide that the annual gross rental income in 1987 was approximately $344,000 (121% of the actual income) because they knew that First Nationwide would consider the annual gross rental income material in valuing the property and in determining whether to make the Prospect Realty Loan and in determining the amount and other terms of the Prospect Realty Loan.

(e) First Nationwide is informed and believes, and on that basis alleges, that Gelt submitted forged loan application documents on behalf of Prospect Realty Associates, including, but not limited to, the loan application.

(f) As a direct, foreseeable and intended consequence of the defendants' deliberate overstatement of gross and net income, the value attributed to the property securing the Prospect Realty Loan by First Nationwide was significantly greater than the actual value of the property at the time. Based on the information provided by Gelt and Prospect Realty Associates, First Nationwide concluded that the property located at 925 Prospect Place, Brooklyn, New York was worth $2,050,000, and thus that the ratio of the loan amount to the value of the property securing the Prospect Realty Loan (the "LTV ratio") was approximately 78%, and that the ratio of the property's net operating income to the debt service obligations

of Prospect Realty Associates (the "DSC ratio") was approximately 1.07. In fact, at the time the loan was made, the value of the property securing the loan was approximately $1,420,000, 31% less than what First Nationwide believed it to be based on the defendants' misrepresentations. As a consequence, the actual LTV and DSC ratios for the loan were approximately 113% and 0.74 respectively.

(g) Had First Nationwide known that the actual value of the property was only $1,420,000, and that the actual LTV and DSC ratios for the loan were approximately 113% and 0.74, respectively, First Nationwide would not have made the Prospect Realty Loan. If First Nationwide had known the true facts, the most that First Nationwide would have loaned to Prospect Realty Associates to finance the purchase of the property located at 925 Prospect Place, Brooklyn, was $1,110,000.

(h) On or about April 1, 1992, Prospect Realty Associates failed to make a required payment of principal and interest as required under the loan agreement. As of December 1, 1992, the total amount outstanding on the Prospect Realty Loan was $1,769,000, the amount that would have to be paid to First Nationwide to cure all defaults under the loan and to reinstate the loan was $223,000.

(i) In particular, the current value of the property located at 925 Prospect Place, Brooklyn, securing the Prospect Realty Loan is approximately $1,271,000. Accordingly, First Nationwide has suffered a loss in connection with the Prospect Realty Loan of approximately $498,000, the difference between the outstanding balance on the Prospect Realty Loan and the current value of the property securing the Prospect Realty Loan. If First Nationwide had known the true facts at the time it made the loan, it would not have suffered any of this loss, because it would either not have made the loan at all, or would have made a loan of $1,110,000. Thus, of this

loss suffered by First Nationwide on the Prospect Realty Loan, $498,000, which is equal to the difference between the amount First Nationwide has lost and the amount First Nationwide would have lost in the absence of defendants' fraud, represents the portion of First Nationwide's loss attributable to the defendants' fraud in connection with the Prospect Realty Loan.

(j) As a consequence of defendants' fraud, First Nationwide on September 30, 1991 took reserves against the Prospect Realty Loan in the amount of $283,000. The reserve amount is equal to the outstanding balance due on the Prospect Realty Loan as of September 30, 1991 (including negative escrow accounts), less the estimated current value of the property securing the Prospect Realty Loan. But for defendants' fraud, First Nationwide Bank would have loaned only approximately $1,110,000, the outstanding balance due on the loan would be not greater than $1,078,000 and, accordingly, no reserves would have been taken. Thus, of the reserves taken by First Nationwide on the Prospect Realty Loan, $283,000, which is equal to the difference between the amount First Nationwide would have reserved in the absence of defendant's fraud, is directly and proximately attributable to the defendants' fraud. As a consequence, First Nationwide was required to reduce its assets and liabilities in order to maintain its regulatory base capital requirement of 4%, and, accordingly First Nationwide has incurred and will continue to incur additional losses of approximately $136,000 per annum because of defendants' fraud.

81. <u>The New Heights 765 Riverside Limited Partnership Loan of January, 1988</u>

(a) On January 6, 1988, First Nationwide made a loan in the amount of $2,800,000 to New Heights 765 Riverside Limited Partnership, a Delaware limited partnership whose general partner was and is New Heights (765 Riverside)

Management Corp., to finance the purchase of a multi-unit apartment building at 765 Riverside Drive, New York, New York (the "New Heights 765 Riverside Limited Partnership Loan"). Gelt acted as the mortgage broker representing New Heights 765 Riverside Limited Partnership in connection with the New Heights 765 Riverside Limited Partnership Loan.

(b) First Nationwide incorporates herein by reference the allegations of paragraphs 60 through 70, as though set forth in full with respect specifically to the New Heights 765 Riverside Limited Partnership Loan.

(c) First Nationwide is informed and believes, and on that basis alleges, that Gelt and New Heights 765 Riverside Limited Partnership misrepresented the net operating income ("NOI") for the property securing the New Heights 765 Riverside Limited Partnership Loan. On information and belief, First Nationwide alleges that the NOI for the property securing the New Heights 765 Riverside Limited Partnership Loan in 1988 was approximately $187,000, that Gelt and New Heights 765 Riverside Limited Partnership knew this, that they misrepresented to First Nationwide that the annual NOI in 1988 was approximately $449,000 (240% of the actual NOI) because they knew that First Nationwide would consider the annual NOI material in valuing the property and in determining whether to make the New Heights 765 Riverside Limited Partnership Loan and in determining the amount and other terms of the New Heights 765 Riverside Limited Partnership Loan.

(d) In particular, First Nationwide is informed and believes, and on that basis alleges, that the annual gross rental income for the property in 1988 was approximately $487,000, that Gelt and New Heights 765 Riverside Limited Partnership knew this and that they misrepresented to First Nationwide that the annual gross rental income in 1988 was approximately $577,000 (119% of the actual gross rental income) because

they knew that First Nationwide would consider the annual gross rental income material in valuing the property and in determining whether to make the New Heights 765 Riverside Limited Partnership Loan and in determining the amount and other terms of the New Heights 765 Riverside Limited Partnership Loan.

(e) Furthermore, First Nationwide is informed and believes, and on that basis alleges, that the annual operating expenses for the property securing the New Heights 765 Riverside Limited Partnership Loan were approximately $300,000, that Gelt and New Heights 765 Riverside Limited Partnership knew this and that they misrepresented to First Nationwide that the annual operating expenses in 1988 were approximately $229,000 (24% less than the actual expenses) because they knew that First Nationwide would consider the annual operating expenses material in valuing the property and in determining whether to make the New Heights 765 Riverside Limited Partnership Loan and in determining the amount and other terms of the New Heights 765 Riverside Limited Partnership Loan.

(f) As a direct, foreseeable and intended consequence of the defendants' deliberate overstatement of gross and net income, the value attributed to the property securing the New Heights 765 Riverside Limited Partnership Loan by First Nationwide was significantly greater than the actual value of the property at the time. Based on the information provided by Gelt and New Heights 765 Riverside Limited Partnership, First Nationwide concluded that the property located at 765 Riverside Drive, New York, New York was worth $3,800,000, and thus that the ratio of the loan amount to the value of the property securing the New Heights 765 Riverside Limited Partnership Loan (the "LTV ratio") was 74%, and that the ratio of the property's net operating income to the debt service obligations of New Heights 765 Riverside Limited Partnership (the "DSC ratio") was 1.09. In fact, at the

time the loan was made, the value of the property securing the loan was approximately $2,040,000, 32% less than what First Nationwide believed it to be based on the defendants' misrepresentations. As a consequence, the actual LTV and DSC ratios for the loan were approximately 137% and 0.60 respectively.

(g) Had First Nationwide known that the actual value of the property was only $2,040,000, and that the actual LTV and DSC ratios for the loan were approximately 137% and 0.60, respectively, First Nationwide would not have made the New Heights 765 Riverside Limited Partnership Loan. If First Nationwide had known the true facts, the most that First Nationwide would have loaned to New Heights 765 Riverside Limited Partnership to finance the purchase of the property located at 765 Riverside Drive, New York, New York was $1,500,000.

(h) On or about April, 1991, New Heights 765 Riverside Limited Partnership failed to make a required payment of principal and interest as required under the loan agreement. As of December 1, 1992, the total amount outstanding on the New Heights 765 Riverside Limited Partnership Loan was $3,357,000, and the amount that would have to be paid to First Nationwide to cure all defaults under the loan and to reinstate the loan was $663,000. First Nationwide has commenced foreclosure proceedings and appointed a receiver over the property securing the New Heights 765 Riverside Limited Partnership Loan.

(i) In particular, based on First Nationwide's most recent appraisal of the property located at 765 Riverside Drive, New York, New York, the value of the property securing the New Heights 765 Riverside Limited Partnership Loan is approximately $1,700,000. Accordingly, First Nationwide has suffered a loss in connection with the New Heights 765 Riverside Limited Partnership Loan of approximately $1,657,000,

the difference between the outstanding balance on the New Heights 765 Riverside Limited Partnership Loan and the current value of the property securing the New Heights 765 Riverside Limited Partnership Loan.

(j) If First Nationwide had known the true facts at the time it made the New Heights 765 Riverside Limited Partnership Loan, it would not have suffered at least $1,657,000 of this loss, because it would either not have made the loan at all, or would have made a loan of $1,500,000. Thus, of this loss suffered by First Nationwide on the New Heights 765 Riverside Limited Partnership Loan, $1,657,000, which is equal to the difference between the amount First Nationwide has lost and the amount First Nationwide would have lost in the absence of defendants' fraud, represents the portion of First Nationwide's loss attributable to the defendants' fraud in connection with the New Heights 765 Riverside Limited Partnership Loan.

(k) As a consequence of defendants' fraud, First Nationwide on September 30, 1991 took reserves against the New Heights 765 Riverside Limited Partnership Loan in the amount of $1,247,000. The reserve amount is equal to the outstanding balance due on the New Heights 765 Riverside Limited Partnership Loan as of September 30, 1992 (including negative escrow accounts), less the estimated current value of the property securing the New Heights 765 Riverside Limited Partnership Loan. But for defendants' fraud, First Nationwide Bank would have loaned only approximately $1,500,000, the outstanding balance due on the loan would be not greater than $1,469,000, and, accordingly, no reserves would have been taken. Thus, of the total reserve taken by First Nationwide on the New Heights 765 Riverside Limited Partnership Loan, $1,247,000, equal to the difference between the amount First Nationwide reserved and the amount First Nationwide would have reserved in the absence of defendants' fraud, is the amount of the reserve directly and proximately

attributable to the defendants' fraud. First Nationwide was required to reduce its assets and liabilities in order to maintain its regulatory base capital requirement of 4% to compensate for the reserve it took on the New Heights 765 Riverside Limited Partnership Loan. First Nationwide has incurred and will continue to incur additional losses of approximately $599,000 per annum as a result of defendants' fraud.

82. The Eastburn Realty Loan of January, 1988

(a) On January 12, 1988, First Nationwide made a loan in the amount of $700,000 to defendant 1691 Eastburn Realty Co., a New York general partnership whose general partners were and are defendants Sol Gross (a/k/a Eugene Gross) and Joseph Friedman, to finance the purchase of a multi-unit apartment building at 1691 Eastburn Avenue, Bronx, New York (the "Eastburn Realty Loan"). Gelt acted as the mortgage broker representing 1691 Eastburn Realty Co. in connection with the Eastburn Realty Loan.

(b) First Nationwide incorporates herein by reference the allegations of paragraphs 60 through 70, as though set forth in full with respect specifically to the Eastburn Realty Loan.

(c) First Nationwide is informed and believes, and on that basis alleges, that Gelt and defendant misrepresented the net operating income ("NOI") for the property securing the Eastburn Realty Loan. On information and belief, First Nationwide alleges that the NOI for the property securing the Eastburn Realty Loan in 1988 was approximately $83,000, that Gelt and defendant knew this, that they misrepresented to First Nationwide that the annual NOI in 1988 was approximately $107,000 (129% of the actual NOI) because they knew that First Nationwide would consider the annual NOI material in valuing the property and in determining whether to make the Eastburn Realty Loan and in determining the amount and other terms of the Eastburn Realty Loan.

(d) In particular, First Nationwide is informed and believes, and on that basis alleges, that the annual gross rental income for the property in 1988 was approximately $143,000, that Gelt and defendant knew this and that they misrepresented to First Nationwide that the annual gross rental income in 1988 was approximately $167,000 (117% of the actual gross rental income) because they knew that First Nationwide would consider the annual gross rental income material in valuing the property and in determining whether to make the Eastburn Realty Loan and in determining the amount and other terms of the Eastburn Realty Loan.

(e) As a direct, foreseeable and intended consequence of the defendants' deliberate overstatement of gross and net income, the value attributed to the property securing the Eastburn Realty Loan by First Nationwide was significantly greater than the actual value of the property at the time. Based on the information provided by Gelt and defendant, First Nationwide concluded that the property located at 1691 Eastburn Avenue, Bronx, New York was worth $1,000,000, and thus that the ratio of the loan amount to the value of the property securing the Eastburn Realty Loan (the "LTV ratio") was 70%, and that the ratio of the property's net operating income to the debt service obligations of 1691 Eastburn Realty Co. (the "DSC ratio") was approximately 1.34. In fact, at the time the loan was made, the value of the property securing the loan was approximately $780,000, 22% less than what First Nationwide believed it to be based on the defendants' misrepresentations. As a consequence, the actual LTV and DSC ratios for the loan were approximately 90% and 1.04 respectively.

(f) Had First Nationwide known that the actual value of the property located at address was only $780,000, and that the actual LTV and DSC ratios for the loan were approximately 90% and 1.04, respectively, First Nationwide would

not have made the Eastburn Realty Loan. If First Nationwide had known the true facts, the most that First Nationwide would have loaned to defendant to finance the purchase of the property located at 1691 Eastburn Avenue, Bronx, New York was $550,000.

(g) On or about March 1, 1991, defendant failed to make a required payment of principal and interest as required under the loan agreement. As of December 1, 1992, the total amount outstanding on the Eastburn Realty Loan was approximately $832,000, and the amount that would have to be paid to First Nationwide to cure all defaults under the loan and to reinstate the loan was approximately $169,000.

(g) In particular, based on First Nationwide's most recent appraisal of the property located at 1691 Eastburn Avenue, Bronx, New York, the value of the property securing the Eastburn Realty Loan is approximately $650,000. Accordingly, First Nationwide has suffered a loss in connection with the Eastburn Realty Loan of approximately $182,000, the difference between the outstanding balance on the Eastburn Realty Loan and the current value of the property securing the Eastburn Realty Loan. If First Nationwide had known the true facts at the time it made the loan, it would not have suffered the full amount of this loss, because it would either not have made the loan at all, or would have made a loan of $550,000. Thus, of this loss suffered by First Nationwide on the Eastburn Realty Loan, $182,000, the difference between the estimated amount First Nationwide has lost and the amount First Nationwide would have lost in the absence of defendants' fraud, represents the portion of First Nationwide's loss attributable to the defendants' fraud in connection with the Eastburn Realty Loan.

(i) As a consequence of defendants' fraud, First Nationwide on September 30, 1991 took reserves against the Eastburn Realty Loan in the amount of $187,000. The reserve

amount is equal to the outstanding balance due on the Eastburn Realty Loan as of September 30, 1991 (including negative escrow accounts), less the estimated current value of the property securing the Eastburn Realty Loan. But for defendants' fraud, First Nationwide Bank would have loaned only approximately $550,000, the outstanding balance due on the loan would be no greater than approximately $532,000, and, accordingly, no reserves would have been taken. Thus, of the total reserve taken by First Nationwide on the Eastburn Realty Loan, approximately $187,000, the difference between the amount First Nationwide reserved and the amount First Nationwide would have reserved in the absence of defendants' fraud, is directly and proximately attributable to the defendants' fraud. As a consequence, First Nationwide was required to reduce its assets and liabilities in order to maintain its regulatory base capital requirement of 4% to compensate for the reserves it took on the Eastburn Realty Loan. First Nationwide has incurred and will continue to incur additional losses of approximately $90,000 per annum because of defendants' fraud.

83. The 46th Street Apartments Loan of January, 1988

(a) On January 14, 1988, First Nationwide made a loan in the amount of $3,500,000 to 4315-4333 46th Street Apartments Corporation, a New York corporation, to finance the purchase of a multi-unit apartment building at 4315-4333 46th Street, Queens (Sunnyside), New York (the "46th Street Apartments Loan"). Gelt acted as the mortgage broker representing 4315-4333 46th Street Apartments Corporation in connection with the 46th Street Apartments Loan

(b) First Nationwide incorporates herein by reference the allegations of paragraphs 60 through 70, as though set forth in full with respect specifically to the 46th Street Apartments Loan.

(c) First Nationwide is informed and believes, and on that basis alleges, that Gelt and 4315-4333 46th Street Apartments Corporation misrepresented the net operating income ("NOI") for the property securing the 46th Street Apartments Loan. On information and belief, First Nationwide alleges that the NOI for the property securing the 46th Street Apartments Loan in 1988 was approximately $213,000, that Gelt and 4315-4333 46th Street Apartments Corporation knew this, that they misrepresented to First Nationwide that the annual NOI in 1988 was approximately $449,000 (or 211% of the actual NOI), because they knew that First Nationwide would consider the annual NOI material in valuing the property and in determining whether to make the 46th Street Apartments Loan and in determining the amount and other terms of the 46th Street Apartments Loan.

(d) In particular, First Nationwide is informed and believes, and on that basis alleges, that the annual gross rental income for the property in 1988 was approximately $478,000, that Gelt and 4315-4333 46th Street Apartments Corporation knew this and that they misrepresented to First Nationwide that the annual gross rental income in 1988 was approximately $714,000 (or 149% of the actual gross rental income) because they knew that First Nationwide would consider the annual gross rental income material in valuing the property and in determining whether to make the 46th Street Apartments Loan and in determining the amount and other terms of the 46th Street Apartments Loan.

(e) As a direct, foreseeable and intended consequence of the defendants' deliberate overstatement of gross and net income, the value attributed to the property securing the 46th Street Apartments Loan by First Nationwide was significantly greater than the actual value of the property at the time. Based on the information provided by Gelt and 4315-4333 46th Street Apartments Corporation, First Nationwide concluded that the property located at 4315-4333 46th Street, Queens

(Sunnyside) was worth $4,500,000, and thus that the ratio of the loan amount to the value of the property securing the 46th Street Apartments Loan (the "LTV ratio") was approximately 78%, and that the ratio of the property's net operating income to the debt service obligations of 4315-4333 46th Street Apartments Corporation (the "DSC ratio") was approximately 1.12. In fact, at the time the loan was made, the value of the property securing the loan was approximately $2,130,000, 53% less than what First Nationwide believed it to be based on the defendants' misrepresentations. As a consequence, the actual LTV and DSC ratios for the loan were approximately 164% and 0.53 respectively.

(f) Had First Nationwide known that the actual value of the property located at 4315-4333 46th Street, Queens (Sunnyside) was only $2,130,000, and that the actual LTV and DSC ratios for the loan were approximately 164% and 0.53, respectively, First Nationwide would not have made the 46th Street Apartments Loan. If First Nationwide had known the true facts, the most that First Nationwide would have loaned to 4315-4333 46th Street Apartments Corporation to finance the purchase of the property located at 4315-4333 46th Street, Queens (Sunnyside) was $1,660,000.

(g) After the 4315-4333 46th Street Apartments Loan went into default, First Nationwide restructured the loan at a loss to First Nationwide of approximately $394,000.

(h) If First Nationwide had known the true facts at the time that it made the 46th Street Apartments Loan, it would not have suffered any of this $394,000 loss, because it would either not have made the loan at all, or would have made a loan of approximately $1,660,000, which would not have gone into default and would not have been restructured at a loss to First Nationwide because the current value of the property securing the loan is estimated to be $2,790,000.

(i) As a consequence of First Nationwide's loss on the 46th Street Apartments Loan, First Nationwide was required to reduce its assets and liabilities in order to maintain its regulatory capital base requirement of 4% and, accordingly, has incurred and will continue to incur additional losses of approximately $773,000 per annum because of defendants' fraud.

84. The Flatbush Realty Loan of April, 1988

(a) On April 11, 1988, First Nationwide made a loan in the amount of $8,000,000 to Flatbush Avenue Realty Associates, a New York general partnership, to finance the purchase of a record storage warehouse at 37-53 Flatbush Avenue, Brooklyn, New York (the "Flatbush Realty Loan"). Gelt acted as the mortgage broker representing Flatbush Avenue Realty Associates in connection with the Flatbush Realty Loan.

(b) First Nationwide incorporates herein by reference the allegations of paragraphs 60 through 70, as though set forth in full with respect specifically to the Flatbush Realty Loan.

(c) First Nationwide is informed and believes, and on that basis alleges, that Gelt and Flatbush Avenue Realty Associates misrepresented the net operating income ("NOI") for the property securing the Flatbush Realty Loan. On information and belief, First Nationwide alleges that the NOI for the property securing the Flatbush Realty Loan in 1988 was approximately $654,000, that Gelt and Flatbush Avenue Realty Associates knew this, that they misrepresented to First Nationwide that the annual NOI in 1988 was approximately $1,001,000 (153% of the actual NOI) because they knew that First Nationwide would consider the annual NOI material in valuing the property and in determining whether to make the Flatbush Realty Loan and in determining the amount and other terms of the Flatbush Realty Loan.

(d) In particular, First Nationwide is informed and believes, and on that basis alleges, that the estimated annual gross rental income for the property in 1988 was approximately $1,230,000, that Gelt and Flatbush Avenue Realty Associates knew this and that they misrepresented to First Nationwide that the annual gross rental income in 1988 was approximately $1,577,000 (128% of the actual gross rental income) because they knew that First Nationwide would consider the annual gross rental income material in valuing the property and in determining whether to make the Flatbush Realty Loan and in determining the amount and other terms of the Flatbush Realty Loan.

(e) First Nationwide is informed and believes, and on that basis alleges, that Flatbush Avenue Realty Associates was buying the property through a flip transaction, that Gelt and Flatbush Avenue Realty Associates knew this, and that they intentionally concealed this fact from First Nationwide because they knew that First Nationwide would consider it material in valuing the property and in determining whether to make the Flatbush Realty Loan and the amount and other terms of the Flatbush Realty Loan. In particular, Flatbush Avenue Realty Associates represented that it was purchasing the collateral property for $10,500,000, though the actual purchase price was $7,031,500, resulting in a profit to Flatbush Avenue Realty Associates on the flip of $3,468,500.

(f) As a direct, foreseeable and intended consequence of the defendants' deliberate overstatement of gross and net income and deliberate concealment of the fact that Flatbush Avenue Realty Associates was acquiring the property through a flip transaction, the value attributed to the property securing the Flatbush Realty Loan by First Nationwide was significantly greater than the actual value of the property at the time. Based on the information provided by Gelt and Flatbush Avenue Realty Associates, First Nationwide concluded that the property located at 37-53 Flatbush Avenue, Brooklyn, New

York was worth $10,500,000, and thus that the ratio of the loan amount to the value of the property securing the Flatbush Realty Loan (the "LTV ratio") was approximately 76%, and that the ratio of the property's net operating income to the debt service obligations of Flatbush Avenue Realty Associates (the "DSC ratio") was approximately 1.09. In fact, at the time the loan was made, the value of the property securing the loan was approximately $6,860,000, 35% less than what First Nationwide believed it to be based on the defendants' misrepresentations. As a consequence, the actual LTV and DSC ratios for the loan were approximately 117% and 0.71 respectively.

(g) Had First Nationwide known that the actual value of the property located at address was only $6,860,000, and that the actual LTV and DSC ratios for the loan were 117% and 0.71, respectively, First Nationwide would not have made the Flatbush Realty Loan. If First Nationwide had known the true facts, the most that First Nationwide would have loaned to Flatbush Avenue Realty Associates to finance the purchase of the property located at 37-53 Flatbush Avenue, Brooklyn, New York was $5,230,000.

(h) After the Flatbush Realty Loan went into default, First Nationwide restructured the loan at a loss to First Nationwide of approximately $668,000.

(i) If First Nationwide had known the true facts at the time that it made the loan, it would not have suffered any of this $668,000 loss, because it would either not have made the loan at all, or would have made a loan of approximately $5,230,000, which would not have gone into default or which would not have been restructured at a loss because based on First Nationwide's most recent appraisal of the property located at 37-53 Flatbush Avenue, Brooklyn, New York, the value of the property securing the Flatbush Realty Loan is approximately $5,100,000.

(j) As a consequence of defendants' fraud, First Nationwide was required to reduce its assets and liabilities to maintain its regulatory capital base requirement of 4% and, as a consequence of defendants' fraud, First Nationwide has incurred and will continue to incur additional losses of approximately $1,513,307 per annum.

85. The 730 Realty Loan of May, 1988

(a) On May 18, 1988, First Nationwide made a loan in the amount of $1,550,000 to defendant 730 Realty Associates, a New York general partnership whose general partners were and are defendants David Malek and Peter Rebenwurzel, to finance the purchase of a multi-unit apartment building at 730 Grand Concourse, Bronx, New York (the "730 Realty Loan"). Gelt acted as the mortgage broker representing 730 Realty Associates in connection with the 730 Realty Loan.

(b) First Nationwide incorporates herein by reference the allegations of paragraphs 60 through 70, as though set forth in full with respect specifically to the 730 Realty Loan.

(c) First Nationwide is informed and believes, and on that basis alleges, that Gelt and 730 Realty Associates misrepresented the net operating income ("NOI") for the property securing the 730 Realty Loan. On information and belief, First Nationwide alleges that the NOI for the property securing the 730 Realty Loan in 1988 was approximately $144,000, that Gelt and 730 Realty Associates knew this, that they misrepresented to First Nationwide that the annual NOI in 1988 was approximately $199,000 (138% of the actual NOI) because they knew that First Nationwide would consider the annual NOI material in valuing the property and in determining whether to make the 730 Realty Loan and in determining the amount and other terms of the 730 Realty Loan.

(d) In particular, First Nationwide is informed and believes, and on that basis alleges, that the annual gross rental income for the property in 1988 was approximately $286,000, that Gelt and 730 Realty Associates knew this and that they misrepresented to First Nationwide that the annual gross rental income in 1988 was approximately $342,000 (120% of the actual gross rental income) because they knew that First Nationwide would consider the annual gross rental income material in valuing the property and in determining whether to make the 730 Realty Loan and in determining the amount and other terms of the 730 Realty Loan.

(e) First Nationwide is informed and believes, and on that basis alleges, that 730 Realty Associates was buying the property through a flip transaction, that Gelt and 730 Realty Associates knew this, and that they intentionally concealed this fact from First Nationwide because they knew that First Nationwide would consider it material in valuing the property and in determining whether to make the 730 Realty Loan and the amount and other terms of the 730 Realty Loan. In particular, 730 Realty Associates represented that it was purchasing the collateral property for $2,100,000, though the actual purchase price was $1,600,000, resulting in a profit to 730 Realty Associates on the flip of $500,000.

(f) First Nationwide is informed and believes, and on that basis alleges, that at the time of the loan Gelt and 730 Realty Associates intended that 730 Realty Associates would obtain additional financing secured by the property located at 730 Grand Concourse, Bronx, New York, that Gelt and 730 Realty Associates knew that the loan agreement between 730 Realty Associates and First Nationwide expressly forbade such additional financing, and that they intentionally concealed from First Nationwide their intent to obtain such additional financing because they knew that First Nationwide would consider it material in determining whether to make the 730 Realty Loan and in determining the amount and other terms of the

730 Realty Loan. In fact, without the knowledge or consent of First Nationwide, and in violation of the loan agreement with First Nationwide, 730 Realty Associates did obtain additional financing, secured by the property, in the amount of $250,000, at about the same time that it received the 730 Realty Loan from First Nationwide.

(g) As a direct, foreseeable and intended consequence of the defendants' deliberate overstatement of gross and net income and deliberate concealment of the fact that 730 Realty Associates was acquiring the property through a flip transaction, the value attributed to the property securing the 730 Realty Loan by First Nationwide was significantly greater than the actual value of the property at the time. Based on the information provided by Gelt and 730 Realty Associates, First Nationwide concluded that the property located at 730 Grand Concourse, Bronx, New York, was worth $2,000,000, and thus that the ratio of the loan amount to the value of the property securing the 730 Realty Loan (the "LTV ratio") was 78%, and that the ratio of the property's net operating income to the debt service obligations of 730 Realty Associates (the "DSC ratio"), was 1.12. In fact, at the time the loan was made, the value of the property securing the loan was approximately $1,440,000, 28% less than what First Nationwide believed it to be based on the defendants' misrepresentations, and 730 Realty Associates had secretly taken on additional debt secured by the property in the amount of approximately $250,000. As a consequence, the actual LTV and DSC ratios for the loan were 125% and 0.66 respectively.

(h) Had First Nationwide known that the actual value of the property located at address was only $1,440,000, that 730 Realty Associates intended to secretly take on additional debt in violation of its loan agreement with First Nationwide, and that the actual LTV and DSC ratios for the loan were 125% and 0.66, respectively, First Nationwide would not have made the 730 Realty Loan. If First Nationwide had known the true

facts, the most that First Nationwide would have loaned to 730 Realty Associates to finance the purchase of the property located at 730 Grand Concourse, Bronx, New York was $770,000.

(i) On or about September 1990, 730 Realty Associates failed to make a required payment of principal and interest as required under the loan agreement. As of December 1, 1992, the total amount outstanding on the 730 Realty Loan was $2,028,000, and the amount that would have to be paid to First Nationwide to cure all defaults under the loan and to reinstate the loan was $557,000. The 730 Realty Loan is currently in bankruptcy and the property is valued at $1,560,000.

(j) In particular, based on First Nationwide's most recent appraisal of the property located at 730 Grand Concourse, Bronx, New York, the value of the property securing the 730 Realty Loan is approximately $1,560,000. Accordingly, First Nationwide has suffered a loss in connection with the 730 Realty Loan of approximately $468,000, the difference between the outstanding balance on the 730 Realty Loan and the current value of the property securing the 730 Realty Loan. If First Nationwide had known the true facts at the time it made the loan, it would not have suffered at least $468,000 of this loss, because it would either not have made the loan at all, or would have made a loan of $770,000, and because the loan would not have gone into default as a result of 730 Realty Associates over-leveraging the property. Thus, of this loss suffered by First Nationwide on the 730 Realty Loan, $468,000, the difference between the amount First Nationwide has lost and the amount First Nationwide would have lost in the absence of defendants' fraud, represents the portion of First Nationwide's loss attributable to the defendants' fraud in connection with the 730 Realty Loan.

(k) As a consequence of defendants' fraud, First Nationwide on September 30, 1991 took reserves against the 730

Realty Loan in the amount of $73,000. The reserve amount is equal to the outstanding balance due on the 730 Realty Loan as of September 30, 1992 (including negative escrow accounts), less the estimated current value of the property securing the 730 Realty Loan. But for defendants' fraud, First Nationwide Bank would have loaned only approximately $770,000, the outstanding balance due on the loan would be not greater than $751,000, and, accordingly, no reserves would have been taken. Thus, of the total reserve taken by First Nationwide on the 730 Realty Loan, $73,000, the difference between the amount First Nationwide reserved and the amount First Nationwide would have reserved in the absence of defendants' fraud, is the amount of the reserve directly and proximately attributable to the defendants' fraud. First Nationwide was required to reduce its assets and liabilities in order to maintain its regulatory base capital requirement of 4% to compensate for the reserves it took on the 730 Realty loan, and will continue to incur additional losses of approximately $35,000 per annum because of defendants' fraud.

86. The 740 Realty Loan of May, 1988

(a) On May 18, First Nationwide made a loan in the amount of $1,550,000 to defendant 740 Realty Associates, a New York general partnership whose general partners were and are defendants David Malek and Peter Rebenwurzel, to finance the purchase of a multi-unit apartment building at 740 Grand Concourse, Bronx, New York (the "740 Realty Loan"). Gelt acted as the mortgage broker representing 740 Realty Associates in connection with the 740 Realty Loan.

(b) First Nationwide incorporates herein by reference the allegations of paragraphs 60 through 70, as though set forth in full with respect specifically to the 740 Realty Loan.

(c) First Nationwide is informed and believes, and on that basis alleges, that Gelt and 740 Realty Associates

misrepresented the net operating income ("NOI") for the property securing the 740 Realty Loan. On information and belief, First Nationwide alleges that the NOI for the property securing the 740 Realty Loan in 1988 was approximately $135,000, that Gelt and 740 Realty Associates knew this, that they misrepresented to First Nationwide that the annual NOI in 1988 was approximately $196,000 (145% of the actual NOI) because they knew that First Nationwide would consider the annual NOI material in valuing the property and in determining whether to make the 740 Realty Loan and in determining the amount and other terms of the 740 Realty Loan.

(d) In particular, First Nationwide is informed and believes, and on that basis alleges, that the annual gross rental income for the property in 1988 was approximately $281,000, that Gelt and 740 Realty Associates knew this and that they misrepresented to First Nationwide that the annual gross rental income in 1988 was approximately $342,000 (122% of the actual gross rental income) because they knew that First Nationwide would consider the annual gross rental income material in valuing the property and in determining whether to make the 740 Realty Loan and in determining the amount and other terms of the 740 Realty Loan.

(e) First Nationwide is informed and believes, and on that basis alleges, that 740 Realty Associates was buying the property through a flip transaction, that Gelt and 740 Realty Associates knew this, and that they intentionally concealed this fact from First Nationwide because they knew that First Nationwide would consider it material in valuing the property and in determining whether to make the 740 Realty Loan and the amount and other terms of the 740 Realty Loan. In particular, 740 Realty Associates represented that it was purchasing the collateral property for $2,100,000, though the actual purchase price was $1,600,000, resulting in a profit to 740 Realty Associates on the flip of $500,000.

(f) First Nationwide is informed and believes, and on that basis alleges, that at the time of the loan Gelt and 740 Realty Associates intended that 740 Realty Associates would obtain additional financing secured by the property located at 740 Grand Concourse, Bronx, New York, that Gelt and 740 Realty Associates knew that the loan agreement between 740 Realty Associates and First Nationwide expressly forbade such additional financing, and that they intentionally concealed from First Nationwide their intent to obtain such additional financing because they knew that First Nationwide would consider it material in determining whether to make the 740 Realty Loan and in determining the amount and other terms of the 740 Realty Loan. In fact, without the knowledge or consent of First Nationwide, and in violation of the loan agreement with First Nationwide, 740 Realty Associates did obtain additional financing, secured by the property, in the amount of $250,000, at about the same time that it received the 740 Realty Loan from First Nationwide.

(g) As a direct, foreseeable and intended consequence of the defendants' deliberate overstatement of gross and net income and deliberate concealment of the fact that 740 Realty Associates was acquiring the property through a flip transaction, the value attributed to the property securing the 740 Realty Loan by First Nationwide was significantly greater than the actual value of the property at the time. Based on the information provided by Gelt and 740 Realty Associates, First Nationwide concluded that the property located at 740 Grand Concourse, Bronx, New York was worth $2,000,000, and thus that the ratio of the loan amount to the value of the property securing the 740 Realty Loan (the "LTV ratio") was 77.5%, and that the ratio of the property's net operating income to the debt service obligations of 740 Realty Associates (the "DSC ratio"), was 1.11. In fact, at the time the loan was made, the value of the property securing the loan was approximately $1,370,000, 32% less than what First Nationwide believed it to be based on the defendants' misrepresentations, and 740

Realty Associates had secretly taken on additional debt secured by the property in the amount of approximately $250,000. As a consequence, the actual LTV and DSC ratios for the loan were 132% and 0.62 respectively.

(h) Had First Nationwide known that the actual value of the property was only $1,370,000, that 740 Realty Associates intended to secretly take on additional debt in violation of its loan agreement with First Nationwide, and that the actual LTV and DSC ratios for the loan were 132% and 0.62, respectively, First Nationwide would not have made the 740 Realty Loan. If First Nationwide had known the true facts, the most that First Nationwide would have loaned to 740 Realty Associates to finance the purchase of the property located at 740 Grand Concourse, Bronx, New York was $710,000.

(i) On or about September, 1, 1990, 740 Realty Associates failed to make a required payment of principal and interest as required under the loan agreement. As of December 1, 1992, the total amount outstanding on the 740 Realty Loan was $1,983,000, and the amount that would have to be paid to First Nationwide to cure all defaults under the loan and to reinstate the loan was $511,000. The 740 Realty Loan is currently in bankruptcy and the property is valued at $1,570,000.

(j) If First Nationwide had known the true facts at the time it made the 740 Realty loan, it would not have suffered at least $413,000 of this loss, because it would either not have made the loan at all, or would have made a loan of $710,000, and because the loan would not have gone into default as a result of 740 Realty Associates over-leveraging the property. Thus, of this loss suffered by First Nationwide on the 740 Realty Loan, $413,000, the difference between the amount First Nationwide has lost and the amount First Nationwide would have lost in the absence of defendants' fraud, represents the portion of First Nationwide's loss attributable to the defendants' fraud in connection with the 740 Realty Loan.

(k) As a consequence of defendants' fraud, First Nationwide on September 30, 1991 took reserves against the 740 Realty Loan in the amount of $50,000. The reserve amount is equal to the outstanding balance due on the 740 Realty Loan as of September 30, 1991 (including negative escrow accounts), less the current value of the property securing the 740 Realty Loan. But for defendants' fraud, First Nationwide Bank would have loaned only approximately $710,000, the outstanding balance due on the loan would be not greater than $693,000, and, accordingly, no reserves would have been taken. Thus, of the total reserve taken by First Nationwide on the 740 Realty Loan, $50,000, the difference between the amount First Nationwide reserved and the amount First Nationwide would have reserved in the absence of defendants' fraud, is the amount of the reserve directly and proximately attributable to the defendants' fraud. First Nationwide was required to reduce its assets and liabilities in order to maintain its regulatory base capital requirement of 4% to compensate for the reserve it took on the 740 Realty loan. First Nationwide has incurred and will continue to incur additional losses of approximately $24,000 per annum because of defendants' fraud.

87. The Central Owners Loan of May, 1988

(a) On May 18, 1988, First Nationwide made a loan in the amount of $2,500,000 to defendant 1261 Central Avenue Owners Corp. a New York corporation, to finance the purchase of a multi-unit apartment building at 1261 Central Avenue, Queens, New York (the "Central Owners Loan"). Defendant 65-11 Realty Co., a New York general partnership and shareholder of defendant 1261 Central Avenue Owners Corp., whose general partners were and are defendants Aviezier Cohen and Elaine Cohen, also executed the promissory note for the Central Owners Loan. Gelt acted as the mortgage broker representing 1261 Central Avenue Owners Corp. and 65-11 Realty Co. in connection with the Central Owners Loan.

(b) First Nationwide incorporates herein by reference the allegations of paragraphs 60 through 70, as though set forth in full with respect specifically to the Central Owners Loan.

(c) First Nationwide is informed and believes, and on that basis alleges, that Gelt and 1261 Central Avenue Owners Corp. misrepresented the net operating income ("NOI") for the property securing the Central Owners Loan. On information and belief, First Nationwide alleges that the NOI for the property securing the Central Owners Loan in 1988 was approximately $395,000, that Gelt and 1261 Central Avenue Owners Corp. knew this, that they misrepresented to First Nationwide that the annual NOI in 1988 was approximately $588,000 (149% of the actual NOI), because they knew that First Nationwide would consider the annual NOI material in valuing the property and in determining whether to make the Central Owners Loan and in determining the amount and other terms of the Central Owners Loan.

(d) In particular, First Nationwide is informed and believes, and on that basis alleges, that the annual gross rental income for the property in 1988 was approximately $988,000, that Gelt and 1261 Central Avenue Owners Corp. knew this and that they misrepresented to First Nationwide that the annual gross rental income in 1988 was approximately $1,182,000 (120% of the actual gross rental income) because they knew that First Nationwide would consider the annual gross rental income material in valuing the property and in determining whether to make the Central Owners Loan and in determining the amount and other terms of the Central Owners Loan.

(e) First Nationwide is informed and believes, and on that basis alleges, that at the time of the loan Gelt and 1261 Central Avenue Owners Corp. intended that 1261 Central Avenue Owners Corp. would obtain additional financing secured by the property located at 1261 Central Avenue, Queens, New

York, that Gelt and 1261 Central Avenue Owners Corp. knew that the loan agreement between 1261 Central Avenue Owners Corp. and First Nationwide expressly forbade such additional financing, and that they intentionally concealed from First Nationwide their intent to obtain such additional financing because they knew that First Nationwide would consider it material in determining whether to make the Central Owners Loan and in determining the amount and other terms of the Central Owners Loan. In fact, without the knowledge or consent of First Nationwide, and in violation of the loan agreement with First Nationwide, 1261 Central Avenue Owners Corp. did obtain additional financing, secured by the property, in the amount of $2,700,000, at about the same time that it received the Central Owners Loan from First Nationwide.

(f) As a direct, foreseeable and intended consequence of the defendants' deliberate overstatement of gross and net income, the value attributed to the property securing the Central Owners Loan by First Nationwide was significantly greater than the actual value of the property at the time. Based on the information provided by Gelt and 1261 Central Avenue Owners Corp., First Nationwide concluded that the property located at 1261 Central Avenue, Queens, New York was worth $7,000,000, and thus that the ratio of the loan amount to the value of the property securing the Central Owners Loan (the "LTV ratio") was approximately 71%, and that the ratio of the property's net operating income to the debt service obligations of 1261 Central Avenue Owners Corp. (the "DSC ratio"), was 1.05. In fact, at the time the loan was made, the value of the property securing the loan was approximately $4,700,000, 33% less than what First Nationwide believed it to be based on the defendants' misrepresentations, and 1261 Central Avenue Owners Corp. had secretly taken on additional debt secured by the property in the amount of approximately $2,700,000. As a consequence, the actual LTV and

DSC ratios for the loan were approximately 164% and 0.46 respectively.

(g) Had First Nationwide known that the actual value of the property located at address was only $4,700,000, that 1261 Central Avenue Owners Corp. intended to secretly take on additional debt in violation of its loan agreement with First Nationwide, and that the actual LTV and DSC ratios for the loan were 164% and 0.50, respectively, First Nationwide would not have made the Central Owners Loan.

(h) On or about May, 1, 1991, 1261 Central Avenue Owners Corp. failed to make a required payment of principal and interest as required under the loan agreement. As of December 1, 1992, the total amount outstanding on the Central Owners Loan was $2,847,000, and the amount that would have to be paid to First Nationwide to cure all defaults under the loan and to reinstate the loan was approximately $412,000.

(i) In particular, based on First Nationwide's most recent appraisal of the property located at 1261 Central Avenue, Queens, New York, the value of the property securing the Central Owners Loan is approximately $4,025,000. Accordingly, First Nationwide has suffered a loss in connection with the Central Owners Loan of approximately $1,322,000, the difference between the outstanding balance on the Central Owners Loan and the current value of the property securing the Central Owners Loan. If First Nationwide had known the true facts at the time it made the loan, it would not have suffered any of this loss, because it would not have made the loan at all, and because the loan would not have gone into default as a result of 1261 Central Avenue Owners Corp. overleveraging the property. Thus, of this loss suffered by First Nationwide on the Central Owners Loan, $1,322,000, the difference between the amount First Nationwide has lost and the estimated amount First Nationwide would have lost in the

absence of defendants' fraud, represents the portion of First Nationwide's loss attributable to the defendants' fraud in connection with the Central Owners Loan.

(j) As a consequence of defendants' fraud, First Nationwide on September 30, 1991 took reserves against Central Owners Loan in the amount of $844,000. The reserve amount is equal to the outstanding balance due on the Central Owners Loan as of September 30, 1991 (including negative escrow accounts), less the estimated current value of the property securing the Central Owners Loan. But for defendants' fraud, First Nationwide Bank would not have made the Central Owners Loan, and, accordingly, no reserves would have been taken. Thus, of the total reserve taken by First Nationwide on the Central Owners Loan, $844,000, the difference between the amount First Nationwide reserved and the amount First Nationwide would have reserved in the absence of defendants' fraud, is the amount of the reserve directly and proximately attributable to the defendants' fraud. First Nationwide was required to reduce its assets and liabilities in order to maintain its regulatory base capital requirement of 4% to compensate for the reserve it took on the Central Owners Loan. First Nationwide has incurred and will continue to incur additional losses of approximately $405,000 per annum because of defendants' fraud.

88. The 2608 Realty Loan of August, 1988

(a) On August 25, 1988, First Nationwide made a loan in the amount of $1,100,000 to defendant 2608 Realty Associates, a New York general partnership whose general partners were and are defendants Solomon Werdiger and Esther Werdiger, to finance the purchase of a multi-unit apartment building at 2608 Creston Avenue, Bronx, New York (the "2608 Realty Loan"). Gelt acted as the mortgage broker representing 2608 Realty Associates in connection with the 2608 Realty Loan.

(b) First Nationwide incorporates herein by reference the allegations of paragraphs 60 through 70, as though set forth in full with respect specifically to the 2608 Realty Loan.

(c) First Nationwide is informed and believes, and on that basis alleges, that Gelt and 2608 Realty Associates misrepresented the net operating income ("NOI") for the property securing the 2608 Realty Loan. On information and belief, First Nationwide alleges that the NOI for the property securing the 2608 Realty Loan in 1988 was approximately $96,400, that Gelt and 2608 Realty Associates knew this, that they misrepresented to First Nationwide that the annual NOI in 1988 was approximately $161,000 (167% of the actual NOI) because they knew that First Nationwide would consider the annual NOI material in valuing the property and in determining whether to make the 2608 Realty Loan and in determining the amount and other terms of the 2608 Realty Loan.

(d) In particular, First Nationwide is informed and believes, and on that basis alleges, that the annual gross rental income for the property in 1988 was approximately $229,000, that Gelt and 2608 Realty Associates knew this and that they misrepresented to First Nationwide that the annual gross rental income in 1988 was approximately $293,000 (128% of the actual gross rental income) because they knew that First Nationwide would consider the annual gross rental income material in valuing the property and in determining whether to make the 2608 Realty Loan and in determining the amount and other terms of the 2608 Realty Loan.

(e) As a direct, foreseeable and intended consequence of the defendants' deliberate overstatement of gross and net income, the value attributed to the property securing the 2608 Realty Loan by First Nationwide was significantly greater than the actual value of the property at the time. Based on the information provided by Gelt and defendant, First Nationwide concluded that the property located at 2608 Creston Avenue,

Bronx, New York was worth $1,475,000, and thus that the ratio of the loan amount to the value of the property securing the 2608 Realty Loan (the "LTV ratio") was approximately 75%, and that the ratio of the property's net operating income to the debt service obligations of defendant (the "DSC ratio") was approximately 1.28. In fact, at the time the loan was made, the value of the property securing the loan was approximately $880,000, 40% less than what First Nationwide believed it to be based on the defendants' misrepresentations. As a consequence, the actual LTV and DSC ratios for the loan were approximately 125% and 0.77 respectively.

(f) Had First Nationwide known that the actual value of the property was only $880,000, and that the actual LTV and DSC ratios for the loan were approximately 125% and 0.77, respectively, First Nationwide would not have made the 2608 Realty Loan. If First Nationwide had known the true facts, the most that First Nationwide would have loaned to 2608 Realty Associates to finance the purchase of the property located at 2608 Creston Avenue, Bronx was $660,000.

(g) On or about September, 1, 1990, defendant failed to make a required payment of principal and interest as required under the loan agreement. As of December 1, 1992, the total amount outstanding on the 2608 Realty Loan was approximately $1,427,000, and the amount that would have to be paid to First Nationwide to cure all defaults under the loan and to reinstate the loan was approximately $377,000.

(h) In particular, based on First Nationwide's most recent appraisal of the property located at 2608 Creston Avenue, Bronx, New York, the value of the property securing the 2608 Realty Loan is approximately $810,000. Accordingly, First Nationwide has suffered a loss in connection with the 2608 Realty Loan of approximately $617,000, the difference between the outstanding balance on the 2608 Realty Loan and the current value of the property securing the 2608 Realty

Loan. If First Nationwide had known the true facts at the time it made the loan, it would not have suffered this loss, because it would either not have made the loan at all, or would have made a loan of $660,000. Thus, of this loss suffered by First Nationwide on the 2608 Realty Loan, approximately $617,000, the difference between the amount First Nationwide has lost and the estimated amount First Nationwide would have lost in the absence of defendants' fraud, represents the portion of First Nationwide's loss attributable to the defendants' fraud in connection with the 2608 Realty Loan.

(i) As a consequence of defendants' fraud, First Nationwide on September 30, 1991 took reserves against the 2608 Realty Loan in the amount of approximately $456,000. The reserve amount is equal to the outstanding balance due on the 2608 Realty Loan as of September 30, 1991 (including negative escrow accounts), less the estimated current value of the property securing the 2608 Realty Loan. But for defendants' fraud, First Nationwide Bank would have loaned only approximately $660,000, the outstanding balance due on the loan would be not greater than approximately $647,000, and, accordingly, no reserves would have been taken. Thus, of the total reserve taken by First Nationwide on the 2608 Realty Loan, approximately $456,000, the difference between the amount First Nationwide reserved and the amount First Nationwide would have reserved in the absence of defendants' fraud, is the amount of the reserve directly and proximately attributable to the defendants' fraud. First Nationwide was required to reduce its assets and liabilities in order to maintain its regulatory base capital requirement of 4% to compensate for the reserve it took on the 2608 Realty Loan. First Nationwide has incurred and will continue to incur additional losses of approximately $647,000 per annum because of defendants' fraud.

89. The Plaza Street Owners Loan of August, 1988

(a) On August 30, 1988, First Nationwide made a loan in the amount of $2,700,000 to defendant 36 Plaza Street Owners Corp. to finance the purchase of a multi-unit apartment building at 36 Plaza Street, Brooklyn, New York (the "Plaza Street Owners Loan"). Gelt acted as the mortgage broker representing 36 Plaza Street Owners Corp. in connection with the Plaza Street Owners Loan.

(b) First Nationwide incorporates herein by reference the allegations of paragraphs 60 through 70, as though set forth in full with respect specifically to the Plaza Street Owners Loan.

(c) First Nationwide is informed and believes, and on that basis alleges, that Gelt and defendant misrepresented the net operating income ("NOI") for the property securing the Plaza Street Owners Loan. On information and belief, First Nationwide alleges that the NOI for the property securing the Plaza Street Owners Loan in 1988 was approximately $180,000, that Gelt and defendant knew this, that they misrepresented to First Nationwide that the annual NOI in 1988 was approximately $314,000 (174% of the actual NOI) because they knew that First Nationwide would consider the annual NOI material in valuing the property and in determining whether to make the Plaza Street Owners Loan and in determining the amount and other terms of the Plaza Street Owners Loan.

(d) In particular, First Nationwide is informed and believes, and on that basis alleges, that the annual gross rental income for the property in 1988 was approximately $389,000, that Gelt and defendant knew this and that they misrepresented to First Nationwide that the annual gross rental income in 1988 was approximately $523,000 (134% of the actual gross rental income) because they knew that First Nationwide would consider the annual gross rental income material in

valuing the property and in determining whether to make the Plaza Street Owners Loan and in determining the amount and other terms of the Plaza Street Owners Loan.

(e) First Nationwide is informed and believes, and on that basis alleges, that defendant was buying the property through a flip transaction, that Gelt and defendant knew this, and that they intentionally concealed this fact from First Nationwide because they knew that First Nationwide would consider it material in valuing the property and in determining whether to make the Plaza Street Owners Loan and the amount and other terms of the Plaza Street Owners Loan. In particular, 36 Plaza Street Owners Corp. represented that it was purchasing the collateral property for $3,700,000, though the actual purchase price was $3,100,000, resulting in a profit to 36 Plaza Street Owners Corp. on the flip of $600,000.

(f) As a direct, foreseeable and intended consequence of the defendants' deliberate overstatement of gross and net income and deliberate concealment of the fact that defendant was acquiring the property through a flip transaction, the value attributed to the property securing the Plaza Street Owners Loan by First Nationwide was significantly greater than the actual value of the property at the time. Based on the information provided by Gelt and defendant, First Nationwide concluded that the property located at 36 Plaza Street, Brooklyn, New York was worth $3,500,000, and thus that the ratio of the loan amount to the value of the property securing the Plaza Street Owners Loan (the "LTV ratio") was approximately 77%, and that the ratio of the property's net operating income to the debt service obligations of defendant (the "DSC ratio") was approximately 1.02. In fact, at the time the loan was made, the value of the property securing the loan was approximately $2,000,000, 43% less than what First Nationwide believed it to be based on the defendants' misrepresentations. As a consequence, the actual LTV and DSC ratios for the loan were approximately 135% and 0.58 respectively.

(g) Had First Nationwide known that the actual value of the property was only $2,000,000, and that the actual LTV and DSC ratios for the loan were approximately 135% and 0.58, respectively, First Nationwide would not have made the Plaza Street Owners Loan. If First Nationwide had known the true facts, the most that First Nationwide would have loaned to defendant to finance the purchase of the property located at 36 Plaza Street, Brooklyn, New York was $1,540,000.

(h) On or about September, 1, 1991, defendant failed to make a required payment of principal and interest as required under the loan agreement. As of December 1, 1992, the total amount outstanding on the Plaza Street Owners Loan was approximately $3,002,000, and the amount that would have to be paid to First Nationwide to cure all defaults under the loan and to reinstate the loan was $374,000.

(i) In particular, based on First Nationwide's most recent appraisal of the property located at 36 Plaza Street, Brooklyn, New York, the value of the property securing Plaza Street Owners Loan is approximately $2,100,000. Accordingly, First Nationwide has suffered a loss in connection with the Plaza Street Owners Loan of approximately $902,000, the difference between the outstanding balance on the Plaza Street Owners Loan and the current value of the property securing the Plaza Street Owners Loan. If First Nationwide had known the true facts at the time it made the loan, it would not have suffered any of this loss, because it would either not have made the loan at all, or would have made a loan of $1,540,000. Thus, of this loss suffered by First Nationwide on the Plaza Street Owners Loan, $902,000, which is equal to the difference between the amount First Nationwide has lost and the amount First Nationwide would have lost in the absence of defendants' fraud, represents the portion of First Nationwide's loss attributable to the defendants' fraud in connection with the Plaza Street Owners Loan.

(j) As a consequence of defendants' fraud, First Nationwide on September 30, 1991 took reserves against the Plaza Street Owners Loan in the amount of $615,000. The reserve amount is equal to the outstanding balance due on the Plaza Street Owners Loan as of September 30, 1991 (including negative escrow accounts), less the estimated current value of the property securing the Plaza Street Owners Loan. But for defendants' fraud, First Nationwide Bank would have loaned only approximately $1,540,000, the outstanding balance due on the loan would be not greater than approximately $1,511,000, and, accordingly, no reserves would have been taken. Thus, of the total reserve taken by First Nationwide on the Plaza Street Owners Loan, $615,000, the difference between the amount First Nationwide reserved and the amount First Nationwide would have reserved in the absence of defendants' fraud, is the amount of the reserve directly and proximately attributable to the defendants' fraud. First Nationwide was required to reduce its assets and liabilities in order to maintain its regulatory base capital requirement of 4% to compensate for the reserve it took on the Plaza Street Owners Loan. First Nationwide has incurred and will continue to incur additional losses of approximately $295,000 per annum because of defendants' fraud.

90. The 1958 Realty Loan of October, 1988

(a) On October 5, 1988, First Nationwide made a loan in the amount of $1,000,000 to defendant 1958 Realty Associates, a New York general partnership whose general partners were and are defendants Menachem Halberstam and Mordechai Halberstam, to refinance existing mortgages on a multi-unit apartment building at 1958 50th Street, Brooklyn, New York (the "1958 Realty Loan"). Gelt acted as the mortgage broker representing 1958 Realty Associates in connection with the 1958 Realty Loan.

(b) First Nationwide incorporates herein by reference the allegations of paragraphs 60 through 70, as though set forth in full with respect specifically to the 1958 Realty Loan.

(c) First Nationwide is informed and believes, and on that basis alleges, that Gelt and 1958 Realty Associates misrepresented the net operating income ("NOI") for the property securing the 1958 Realty Loan. On information and belief, First Nationwide alleges that the NOI for the property securing the 1958 Realty Loan in 1988 was approximately $69,000, that Gelt and 1958 Realty Associates knew this, that they misrepresented to First Nationwide that the annual NOI in 1988 was approximately $115,000 (167% of the actual NOI) because they knew that First Nationwide would consider the annual NOI material in valuing the property and in determining whether to make the 1958 Realty Loan and in determining the amount and other terms of the 1958 Realty Loan.

(d) In particular, First Nationwide is informed and believes, and on that basis alleges, that the annual gross rental income for the property in 1988 was approximately $150,000, that Gelt and 1958 Realty Associates knew this and that they misrepresented to First Nationwide that the annual gross rental income in 1988 was approximately $196,000 (131% of the actual gross rental income) because they knew that First Nationwide would consider the annual gross rental income material in valuing the property and in determining whether to make the 1958 Realty Loan and in determining the amount and other terms of the 1958 Realty Loan.

(e) As a direct, foreseeable and intended consequence of the defendants' deliberate overstatement of gross and net income, the value attributed to the property securing the 1958 Realty Loan by First Nationwide was significantly greater than the actual value of the property at the time. Based on the information provided by Gelt and 1958 Realty Associates, First Nationwide concluded that the property located at 1958

50th Street, Brooklyn, New York was worth $1,300,000, and thus that the ratio of the loan amount to the value of the property securing the 1958 Realty Loan (the "LTV ratio") was approximately 77%, and that the ratio of the property's net operating income to the debt service obligations of 1958 Realty Associates (the "DSC ratio") was approximately 1.0. In fact, at the time the loan was made, the value of the property securing the loan was approximately $780,000, 40% less than what First Nationwide believed it to be based on the defendants' misrepresentations. As a consequence, the actual LTV and DSC ratios for the loan were approximately 128% and 0.60 respectively.

(f) Had First Nationwide known that the actual value of the property was only $780,000, and that the actual LTV and DSC ratios for the loan were approximately 128% and 0.60, respectively, First Nationwide would not have made the 1958 Realty Loan. If First Nationwide had known the true facts, the most that First Nationwide would have loaned to 1958 Realty Associates to refinance the property located at 1958 50th Street, Brooklyn, New York was $600,000.

(g) On or about July 1990, 1958 Realty Associates failed to make a required payment of principal and interest as required under the loan agreement. As of December 1, 1992, the total amount outstanding on the 1958 Realty Loan was $1,245,000, and the amount that would have to be paid to First Nationwide to cure all defaults under the loan and to reinstate the loan was $272,000. The 1958 Realty loan is currently in foreclosure and the property is currently valued at $500,000.

(h) In particular, based on First Nationwide's most recent appraisal of the property located at 1958 50th Street, Brooklyn, New York, the value of the property securing 1958 Realty Loan is approximately $500,000. Accordingly, First Nationwide has suffered a loss in connection with 1958 Realty

Loan of approximately $745,000, the difference between the outstanding balance on the 1958 Realty Loan and the current value of the property securing the 1958 Realty Loan. If First Nationwide had known the true facts at the time it made the loan, it would not have suffered at least a portion of this loss, because it would either not have made the loan at all, or would have made a loan of only $600,000. Thus, of this loss suffered by First Nationwide on the 1958 Realty Loan, $651,000, the difference between the amount First Nationwide has lost and the estimated amount First Nationwide would have lost in the absence of defendants' fraud, represents the portion of First Nationwide's loss attributable to the defendants' fraud in connection with the 1958 Realty Loan.

(i) As a consequence of defendants' fraud, First Nationwide on September 30, 1991 took reserves against the 1958 Realty Loan in the amount of $524,000. The reserve amount is equal to the outstanding balance due on the 1958 Realty Loan as of September 30, 1991 (including negative escrow accounts), less the estimated current value of the property securing the 1958 Realty Loan. But for defendants' fraud, First Nationwide Bank would have loaned only approximately $600,000, the outstanding balance due on the loan would be not greater than approximately $594,000, and, accordingly, the reserve amount First Nationwide would have taken would have been $94,000. Thus, of the total reserve taken by First Nationwide on the 1958 Realty Loan, $430,000, the difference between the amount First Nationwide reserved and the amount First Nationwide would have reserved in the absence of defendants' fraud, is the amount of the reserve directly and proximately attributable to the defendants' fraud. First Nationwide was required to reduce its assets and liabilities in order to maintain its regulatory base capital requirement of 4% to compensate it for the reserve it took on the 1958 Realty Loan. First Nationwide has incurred and will continue to incur additional losses of approximately $207,000 per annum as a result of defendants' fraud.

91. The 2344 Davidson Associates Loan of October, 1988

(a) On October 12, 1988, First Nationwide made a loan in the amount of $1,500,000 to defendant 2344 Davidson Associates, a New York general partnership whose general partners were and are defendants David Malek, Jacob Rabinowitz, and Peter Rebenwurzel, to finance the purchase of a multi-unit apartment building at 2344 Davidson Avenue, Bronx, New York (The "2344 Davidson Associates Loan"). Gelt acted as the mortgage broker representing 2344 Davidson Associates in connection with the 2344 Davidson Associates Loan.

(b) First Nationwide incorporates herein by reference paragraphs 60 through 70, as though set forth in full with respect specifically to the 2344 Davidson Associates Loan.

(c) First Nationwide is informed and believes, and on that basis alleges, that Gelt and 2344 Davidson Associates misrepresented the net operating income ("NOI") for the property securing the 2344 Davidson Associates Loan. On information and belief, First Nationwide alleges that the NOI for the property securing the 2344 Davidson Associates Loan in 1988 was approximately $168,000, that Gelt and 2344 Davidson Associates knew this, that they misrepresented to First Nationwide that the annual NOI in 1988 was approximately $215,000 (128% of the actual NOI) because they knew that First Nationwide would consider the annual NOI material in valuing the property and in determining whether to make the 2344 Davidson Associates Loan and in determining the amount and other terms of the 2344 Davidson Associates Loan.

(d) In particular, First Nationwide is informed and believes, and on that basis alleges, that the annual gross rental income for the property in 1988 was approximately $307,000, that Gelt and 2344 Davidson Associates knew this and that they misrepresented to First Nationwide that the annual gross

rental income in 1988 was approximately $353,000 (115% of the actual gross rental income) because they knew that First Nationwide would consider the annual gross rental income material in valuing the property and in determining whether to make the 2344 Davidson Associates Loan and in determining the amount and other terms of the 2344 Davidson Associates Loan.

(e) As a direct, foreseeable and intended consequence of the defendants' deliberate overstatement of gross and net income, the value attributed to the property securing the 2344 Davidson Associates Loan by First Nationwide was significantly greater than the actual value of the property at the time. Based on the information provided by Gelt and 2344 Davidson Associates, First Nationwide concluded that the property located at 2344 Davidson Avenue, Bronx, New York was worth $2,000,000, and thus that the ratio of the loan amount to the value of the property securing the 2344 Davidson Associates Loan (the "LTV ratio") was approximately 75%, and that the ratio of the property's net operating income to the debt service obligations of 2344 Davidson Associates (the "DSC ratio") was 1.25. In fact, at the time the loan was made, the value of the property securing the loan was approximately $1,570,000, 22% less than what First Nationwide believed it to be based on the defendants' misrepresentations. As a consequence, the actual LTV and DSC ratios for the loan were approximately 96% and 0.98 respectively.

(f) Had First Nationwide known that the actual value of the property was only $1,570,000, and that the actual LTV and DSC ratios for the loan were 96% and 0.98, respectively, First Nationwide would not have made the 2344 Davidson Associates Loan. If First Nationwide had known the true facts, the most that First Nationwide would have loaned to 2344 Davidson Associates to finance the purchase of the property located at 2344 Davidson Avenue, Bronx, New York was $1,180,000.

(g) After the 2344 Davidson Associates Loan went into default, First Nationwide sold the loan to a third party at a loss to First Nationwide of approximately $1,073,000.

(h) If First Nationwide had known the true facts at the time that it made the 2344 Davidson Associates Loan, it would not have suffered any of this $1,073,000 loss because it would either not have made the loan at all, or would have made a loan of approximately $1,180,000, which would not have gone into default and would not have been sold at a loss to First Nationwide since the property would have been worth more than the amount of the loan.

(i) As a consequence of First Nationwide's loss on the 2344 Davidson Associates Loan, First Nationwide was required to reduce its assets and liabilities in order to maintain its regulatory base capital requirement of 4%, and, as a consequence of this reduction, First Nationwide has incurred additional losses of approximately $2,102,372 per annum as a result of defendants' fraud.

92. The 46th Street Owners Loan of October, 1988

(a) On October 18, 1988, First Nationwide made a loan in the amount of $1,400,000 to 43-01 46th Street Owners Corporation to finance the purchase of a multi-unit apartment building at 43-01 46th Street, Queens (Sunnyside), New York (the "46th Street Owners Loan"). Gelt acted as the mortgage broker representing 43-01 46th Street Owners Corporation in connection with the 46th Street Owners Loan.

(b) First Nationwide incorporates herein by reference the allegations of paragraphs 60 through 70, as though set forth in full with respect specifically to the 46th Street Owners Loan.

(c) First Nationwide is informed and believes, and on that basis alleges, that Gelt and 43-01 46th Street Owners

Corporation misrepresented the net operating income ("NOI") for the property securing the 46th Street Owners Loan. On information and belief, First Nationwide alleges that the NOI for the property securing the 46th Street Owners Loan in 1988 was approximately $64,000, that Gelt and 43-01 46th Street Owners Corporation knew this, that they misrepresented to First Nationwide that the annual NOI in 1988 was approximately $175,000 (273% of the actual NOI), because they knew that First Nationwide would consider the annual NOI material in valuing the property and in determining whether to make the 46th Street Owners Loan and in determining the amount and other terms of the 46th Street Owners Loan.

(d) In particular, First Nationwide is informed and believes, and on that basis alleges, that the annual gross rental income for the property in 1988 was approximately $186,000, that Gelt and 43-01 46th Street Owners Corporation knew this and that they misrepresented to First Nationwide that the annual gross rental income in 1988 was approximately $297,000 (160% of the actual gross rental income) because they knew that First Nationwide would consider the annual gross rental income material in valuing the property and in determining whether to make the 46th Street Owners Loan and in determining the amount and other terms of the 46th Street Owners Loan.

(e) As a direct, foreseeable and intended consequence of the defendants' deliberate overstatement of gross and net income, the value attributed to the property securing the 46th Street Owners Loan by First Nationwide was significantly greater than the actual value of the property at the time. Based on the information provided by Gelt and 43-01 46th Street Owners Corporation, First Nationwide concluded that the property located at 43-01 46th Street, Queens (Sunnyside) was worth $2,000,000, and thus that the ratio of the loan amount to the value of the property securing the 46th Street Owners Loan (the "LTV ratio") was 70%, and that the ratio of

the property's net operating income to the debt service obligations of 43-01 46th Street Owners Corporation (the "DSC ratio") was 1.10. In fact, at the time the loan was made, the value of the property securing the loan was approximately $730,000, 64% less than what First Nationwide believed it to be based on the defendants' misrepresentations. As a consequence, the actual LTV and DSC ratios for the loan were approximately 192% and 0.40 respectively.

(f) Had First Nationwide known that the actual value of the property was only $730,000, and that the actual LTV and DSC ratios for the loan were approximately 192% and 0.40, respectively, First Nationwide would not have made the 46th Street Owners Loan. If First Nationwide had known the true facts, the most that First Nationwide would have loaned to 43-01 46th Street Owners Corporation to finance the purchase of the property located at 43-01 46th Street, Queens (Sunnyside) was $510,000.

(g) After the 43-01 46th Street Owners Loan went into default, First Nationwide sold the 46th Street Owners Loan to a third party at a loss to First Nationwide of approximately $1,073,000.

(h) If First Nationwide had known the true facts at the time that it made the 46th Street Owners Loan, it would not have suffered any of this $1,073,000 loss, because it would either not have made the loan at all, or would have made a loan of approximately $510,000, which would not have gone into default and would not have been sold at a loss since the property would have been worth more than the amount of the loan.

(i) As a consequence of First Nationwide's loss on the 46th Street Owners Loan, First Nationwide was required to reduce its assets and liabilities in order to maintain its regulatory base capital requirement of 4% and, accordingly, First

Nationwide has incurred additional losses of approximately $2,102,000 per annum because of defendants' fraud.

93. The Brookhaven Realty Loan of November, 1988

(a) On November 30, 1988, First Nationwide made a loan in the amount of $1,450,000 to defendant Brookhaven Realty Associates, a New York general partnership whose general partners were and are defendants Gross and Edith Gross, to finance the purchase of a multi-unit apartment building at 22-11 Brookhaven Avenue, Brooklyn, New York (the "Brookhaven Realty Loan"). Gelt acted as the mortgage broker representing Brookhaven Realty Associates in connection with the Brookhaven Realty Loan.

(b) First Nationwide incorporates herein by reference the allegations of paragraphs 60 through 70, as though set forth in full with respect specifically to the Brookhaven Realty Loan.

(c) First Nationwide is informed and believes, and on that basis alleges, that Gelt and Brookhaven Realty Associates misrepresented the net operating income ("NOI") for the property securing the Brookhaven Realty Loan. On information and belief, First Nationwide alleges that the NOI for the property securing the Brookhaven Realty Loan in 1988 was approximately $109,000, that Gelt and Brookhaven Realty Associates knew this, that they misrepresented to First Nationwide that the annual NOI in 1988 was approximately $173,000 (159% of the actual NOI) because they knew that First Nationwide would consider the annual NOI material in valuing the property and in determining whether to make the Brookhaven Realty Loan and in determining the amount and other terms of the Brookhaven Realty Loan.

(d) In particular, First Nationwide is informed and believes, and on that basis alleges, that the annual gross rental income for the property in 1988 was approximately $286,000,

that Gelt and Brookhaven Realty Associates knew this and that they misrepresented to First Nationwide that the annual gross rental income in 1988 was approximately $349,000 (122% of the actual gross rental income) because they knew that First Nationwide would consider the annual gross rental income material in valuing the property and in determining whether to make the Brookhaven Realty Loan and in determining the amount and other terms of the Brookhaven Realty Loan.

(e) First Nationwide is informed and believes, and on that basis alleges, that Brookhaven Realty Associates was buying the property through a flip transaction, that Gelt and Brookhaven Realty Associates knew this, and that they intentionally concealed this fact from First Nationwide because they knew that First Nationwide would consider it material in valuing the property and in determining whether to make the Brookhaven Realty Loan and the amount and other terms of the Brookhaven Realty Loan. In particular, Brookhaven Realty Associates represented that it was purchasing the collateral property for $1,950,000, though the actual purchase price was $1,450,000, resulting in a profit to Brookhaven Realty Associates on the flip of $500,000.

(f) As a direct, foreseeable and intended consequence of the defendants' deliberate overstatement of gross and net income and deliberate concealment of the fact that Brookhaven Realty Associates was acquiring the property through a flip transaction, the value attributed to the property securing the Brookhaven Realty Loan by First Nationwide was significantly greater than the actual value of the property at the time. Based on the information provided by Gelt and Brookhaven Realty Associates, First Nationwide concluded that the property located at 22-11 Brookhaven Avenue, Brooklyn, New York was worth $2,000,000, and thus that the ratio of the loan amount to the value of the property securing the Brookhaven Realty Loan (the "LTV ratio") was 73%, and that the ratio of

the property's net operating income to the debt service obligations of Brookhaven Realty Associates (the "DSC ratio") was 1.04. In fact, at the time the loan was made, the value of the property securing the loan was approximately $1,270,000, 37% less than what First Nationwide believed it to be based on the defendants' misrepresentations. As a consequence, the actual LTV and DSC ratios for the loan were approximately 115% and 0.66 respectively.

(g) Had First Nationwide known that the actual value of the property was only $1,270,000, and that the actual LTV and DSC ratios for the loan were approximately 115% and 0.66, respectively, First Nationwide would not have made the Brookhaven Realty Loan. If First Nationwide had known the true facts, the most that First Nationwide would have loaned to Brookhaven Realty Associates to finance the purchase of the property located 22-11 Brookhaven Avenue, Brooklyn, New York was $920,000.

(h) On or about March 1, 1991, Brookhaven Realty Associates failed to make a required payment of principal and interest as required under the loan agreement. As of December 1, 1992, the total amount outstanding on the Brookhaven Realty Loan was approximately $1,639,000, and the amount that would have to be paid to First Nationwide to cure all defaults under the loan and to reinstate the loan was approximately $220,000.

(i) In particular, based on First Nationwide's most recent appraisal of the property located at 22-11 Brookhaven Avenue, Brooklyn, New York, the value of the property securing the Brookhaven Realty Loan is approximately $1,400,000. Accordingly, First Nationwide has suffered a loss in connection with the Brookhaven Realty Loan of approximately $239,000, the difference between the outstanding balance on the Brookhaven Realty Loan and the current value of the property securing the Brookhaven Realty Loan. If First

Nationwide had known the true facts at the time it made the loan, it would not have suffered any of this loss, because it would either not have made the loan at all, or would have made a loan of $920,000. Thus, of this loss suffered by First Nationwide on the Brookhaven Realty Loan, $239,000, which is equal to the difference between the amount First Nationwide has lost and the amount First Nationwide would have lost in the absence of defendants' fraud, represents the portion of First Nationwide's loss attributable to the defendants' fraud in connection with the Brookhaven Realty Loan.

(j) As a consequence of the defendants' fraud, First Nationwide on September 30, 1991 took reserves against the Brookhaven Realty Loan in the amount of $206,000. The reserve amount is equal to the outstanding balance due on the Brookhaven Realty Loan as of September 30, 1991 (including negative escrow accounts), less the estimated current value of the property securing the Brookhaven Realty Loan. But for defendants' fraud, First Nationwide Bank would have loaned only approximately $920,000, the outstanding balance due on the loan would be not greater than approximately $909,000, and, accordingly, no reserves would have been taken. Thus, of the total reserve taken by First Nationwide on the Brookhaven Realty Loan, $206,000, equal to the difference between the amount First Nationwide reserved and the amount First Nationwide would have reserved in the absence of defendants' fraud, is the amount of the reserve directly and proximately attributable to the defendants' fraud. First Nationwide was required to reduce its assets and liabilities in order to maintain its regulatory base capital requirement of 4% to compensate for the reserve it took on the Brookhaven Realty Loan. First Nationwide has incurred and will continue to incur additional losses of approximately $199,000 per annum because of defendants' fraud.

94. The Sterling Associates Loan of November, 1988

(a) On November 30, 1988, First Nationwide made a loan in the amount of 2,300,000 to defendant 350 Sterling Associates, a New York general partnership whose general partners were and are defendants Gross and Edith Gross, to finance the purchase of a multi-unit apartment building at 350 Sterling Street, Brooklyn, New York (the "Sterling Associates Loan"). Gelt acted as the mortgage broker representing 350 Sterling Associates in connection with the Sterling Associates Loan.

(b) First Nationwide incorporates herein by reference the allegations of paragraphs 60 through 70, as though set forth in full with respect specifically to the Sterling Associates Loan.

(c) First Nationwide is informed and believes, and on that basis alleges, that Gelt and 350 Sterling Associates misrepresented the net operating income ("NOI") for the property securing the Sterling Associates Loan. On information and belief, First Nationwide alleges that the NOI for the property securing the Sterling Associates Loan in 1988 was approximately $228,000, that Gelt and 350 Sterling Associates knew this, that they misrepresented to First Nationwide that the annual NOI in 1988 was approximately $318,000 (139% of the actual NOI) because they knew that First Nationwide would consider the annual NOI material in valuing the property and in determining whether to make the Sterling Associates Loan and in determining the amount and other terms of the Sterling Associates Loan.

(d) In particular, First Nationwide is informed and believes, and on that basis alleges, that the annual gross rental income for the property in 1988 was approximately $452,000, that Gelt and 350 Sterling Associates knew this and that they misrepresented to First Nationwide that the annual gross rental income in 1988 was approximately $542,000 (120% of the actual gross rental income) because they knew that First Nationwide would consider the annual gross rental income

material in valuing the property and in determining whether to make the Sterling Associates Loan and in determining the amount and other terms of the Sterling Associates Loan.

(e) First Nationwide is informed and believes, and on that basis alleges, that 350 Sterling Associates was buying the property through a flip transaction, that Gelt and 350 Sterling Associates knew this, and that they intentionally concealed this fact from First Nationwide because they knew that First Nationwide would consider it material in valuing the property and in determining whether to make the Sterling Associates Loan and the amount and other terms of the Sterling Associates Loan. In particular, 350 Sterling Associates represented that it was purchasing the collateral property for $2,950,000, though the actual purchase price was $2,537,000, resulting in a profit to 350 Sterling Associates on the flip of $412,500.

(f) As a direct, foreseeable and intended consequence of the defendants' deliberate overstatement of gross and net income and deliberate concealment of the fact that 350 Sterling Associates was acquiring the property through a flip transaction, the value attributed to the property securing the Sterling Associates Loan by First Nationwide was significantly greater than the actual value of the property at the time. Based on the information provided by Gelt and 350 Sterling Associates, First Nationwide concluded that the property located at 350 Sterling Street, Brooklyn, New York was worth $2,900,000 and thus that the ratio of the loan amount to the value of the property securing the Sterling Associates Loan (the "LTV ratio") was 79%, and that the ratio of the property's net operating income to the debt service obligations of 350 Sterling Associates (the "DSC ratio") was 1.21. In fact, at the time the loan was made, the value of the property securing the loan was approximately $2,080,000, 28% less than what First Nationwide believed it to be based on the defendants' misrepresentations. As a consequence, the actual LTV and DSC

ratios for the loan were approximately 111% and 0.87 respectively.

(g) Had First Nationwide known that the actual value of the property was only $2,080,000, and that the actual LTV and DSC ratios for the loan were approximately 111% and 0.87, respectively, First Nationwide would not have made the Sterling Associates Loan. If First Nationwide had known the true facts, the most that First Nationwide would have loaned to 350 Sterling Associates to finance the purchase of the property located at 350 Sterling Street, Brooklyn, New York, was $1,650,000.

(h) On or about March 1, 1991, 350 Sterling Associates failed to make a required payment of principal and interest as required under the loan agreement. As of December 1, 1992, the total amount outstanding on the Sterling Associates Loan was $2,655,000, and the amount that would have to be paid to First Nationwide to cure all defaults under the loan and to reinstate the loan was $416,000. The Sterling Associates Loan is in bankruptcy and the property is currently valued at $1,785,000.

(i) In particular, based on First Nationwide's most recent appraisal of the property located at 350 Sterling Street, Brooklyn, New York, the value of the property securing the Sterling Associates Loan is approximately $1,785,000. Accordingly, First Nationwide has suffered a loss in connection with the Sterling Associates Loan of approximately $870,000, the difference between the outstanding balance on the Sterling Associates Loan and the current value of the property securing the Sterling Associates Loan. If First Nationwide had known the true facts at the time of the loan, it would not have suffered any of this loss, because it would either not have made the loan at all, or would have made a loan of $1,650,000. Thus, of this loss suffered by First Nationwide on the Sterling Associates Loan, $870,000, equal to the difference

between the amount First Nationwide has lost and the estimated amount First Nationwide would have lost in the absence of defendant's fraud, represents the portion of First Nationwide's loss attributable to the defendants' fraud in connection with the Sterling Associates Loan.

(j) As a consequence defendants' fraud, First Nationwide on September 30, 1991 took reserves against the Sterling Associates Loan in the amount of $523,000. The reserve amount is equal to the outstanding balance due on the Sterling Associates Loan as of September 30, 1991 (including negative escrow accounts), less the estimated current value of the property securing the Sterling Associates Loan. But for defendants' fraud, First Nationwide Bank would have loaned only approximately $1,650,000, the outstanding balance due on the loan would be not greater than $1,629,000, and, accordingly, no reserves would have been taken. Thus, of the total reserve taken by First Nationwide on the Sterling Associates Loan, $523,000 is directly and proximately attributable to the defendants' fraud. First Nationwide was required to reduce its assets and liabilities in order to maintain its regulatory base capital requirement of 4% to compensate it for the reserve it took on the Sterling Associates Loan. First Nationwide has incurred and will continue to incur additional losses of approximately $251,000 per annum as a result of defendants' fraud.

95. The Crown Equities Loan

(a) On December 29, 1988, First Nationwide made a loan in the amount of $2,700,000 to Crown Equities Limited Partnership, a Delaware limited partnership, to finance the purchase of a multi-unit apartment building at 763 Eastern Parkway, Brooklyn, New York (the "Crown Equities Loan"). Gelt acted as the mortgage broker representing Crown Equities Limited Partnership in connection with the Crown Equities Loan.

(b) First Nationwide incorporates herein by reference the allegations of paragraphs 60 through 70, as though set forth in full with respect specifically to the Crown Equities Loan.

(c) First Nationwide is informed and believes, and on that basis alleges, that Gelt and Crown Equities Limited Partnership misrepresented the net operating income ("NOI") for the property securing the Crown Equities Loan. On information and belief, First Nationwide alleges that the NOI for the property securing the Crown Equities Loan in 1988 was approximately $253,000, that Gelt and Crown Equities Limited Partnership knew this, that they misrepresented to First Nationwide that the annual NOI in 1988 was approximately $390,000 (or 154% of the actual NOI), because they knew that First Nationwide would consider the annual NOI material in valuing the property and in determining whether to make the Crown Equities Loan and in determining the amount and other terms of the Crown Equities Loan.

(d) In particular, First Nationwide is informed and believes, and on that basis alleges, that the annual gross rental income for the property in 1988 was approximately $487,000, that Gelt and Crown Equities Limited Partnership knew this and that they misrepresented to First Nationwide that the annual gross rental income in 1988 was approximately $624,000 (or 128% of the actual income) because they knew that First Nationwide would consider the annual gross rental income material in valuing the property and in determining whether to make the Crown Equities Loan and in determining the amount and other terms of the Crown Equities Loan.

(e) First Nationwide is informed and believes, and on that basis alleges, that Crown Equities Limited Partnership was buying the property through a flip transaction, that Gelt and Crown Equities Limited Partnership knew this, and that they intentionally concealed this fact from First Nationwide because they knew that First Nationwide would consider it

material in valuing the property and in determining whether to make the Crown Equities Loan and the amount and other terms of the Crown Equities Loan. In particular Crown Equities Limited Partnership represented that it was purchasing the collateral property for $3,500,000, though the actual purchase price was $3,000,000, resulting in a profit to Crown Equities Limited Partnership on the flip of $500,000.

(f) First Nationwide is informed and believes, and on that basis alleges, that at the time of the loan Gelt and Crown Equities Limited Partnership intended that Crown Equities Limited Partnership would obtain additional financing secured by the property located at 763 Eastern Parkway, Brooklyn, New York, that Gelt and Crown Equities Limited Partnership knew that the loan agreement between Crown Equities Limited Partnership and First Nationwide expressly forbade such additional financing, and that they intentionally concealed from First Nationwide their intent to obtain such additional financing because they knew that First Nationwide would consider it material in determining whether to make the Crown Equities Loan and in determining the amount and other terms of the Crown Equities Loan. In fact, without the knowledge or consent of First Nationwide, and in violation of the loan agreement with First Nationwide, Crown Equities Limited Partnership did obtain additional financing, secured by the property, in the amount of $400,000, at about the same time that it received the Crown Equities Loan from First Nationwide.

(g) As a direct, foreseeable and intended consequence of the defendants' deliberate overstatement of gross and net income and deliberate concealment of the fact that Crown Equities Limited Partnership was acquiring the property through a flip transaction, the value attributed to the property securing the Crown Equities Loan by First Nationwide was significantly greater than the actual value of the property at the time. Based on the information provided by Gelt and Crown

Equities Limited Partnership, First Nationwide concluded that the property located at 763 Eastern Parkway, Brooklyn, was worth $3,750,000, and thus that the ratio of the loan amount to the value of the property securing the Crown Equities Loan (the "LTV ratio") was 72%, and that the ratio of the property's net operating income to the debt service obligations of Crown Equities Limited Partnership (the "DSC ratio") was 1.26. In fact, at the time the loan was made, the value of the property securing the loan was approximately $2,430,000, 35% less than what First Nationwide believed it to be based on the defendants' misrepresentations, and Crown Equities Limited Partnership had secretly taken on additional debt secured by the property in the amount of approximately $400,000. As a consequence, the actual LTV and DSC ratios for the loan were 128% and 0.73 respectively.

(h) Had First Nationwide known that the actual value of the property located at address was only $2,080,000, that Crown Equities Limited Partnership intended to secretly take on additional debt in violation of its loan agreement with First Nationwide, and that the actual LTV and DSC ratios for the loan were 128% and 0.73, respectively, First Nationwide would not have made the Crown Equities Loan. If First Nationwide had known the true facts, the most that First Nationwide would have loaned to Crown Equities Limited Partnership to finance the purchase of the property located at 763 Eastern Parkway, Brooklyn, was $1,320,000.

(i) On or about November, 1990, Crown Equities Limited Partnership failed to make a required payment of principal and interest as required under the loan agreement. As of December 1, 1992, the total amount outstanding on the Crown Equities Loan was $3,329,000, and the amount that would have to be paid to First Nationwide to cure all defaults under the loan and to reinstate the loan was $862,000.

(j) In particular, based on First Nationwide's most recent appraisal of the property located at 763 Eastern Parkway, Brooklyn, New York, the value of the property securing the Crown Equities Loan is approximately $1,767,000. Accordingly, First Nationwide has suffered a loss in connection with the Crown Equities Loan of approximately $1,562,000, the difference between the outstanding balance on the Crown Equities Loan and the current value of the property securing the Crown Equities Loan. If First Nationwide had known the true facts at the time it made the loan, it would not have suffered at least a portion of this loss, because it would either not have made the loan at all, or would have made a loan of only $1,320,000, and because the loan would not have gone into default as a result of Crown Equities Limited Partnership over-leveraging the property. Thus, of this loss suffered by First Nationwide on the Crown Equities Loan, $1,562,000, the difference between the amount First Nationwide has lost and the estimated amount First Nationwide would have lost in the absence of defendant's fraud, represents the portion of First Nationwide's loss attributable to the defendants' fraud in connection with the Crown Equities Loan.

(k) As a consequence of defendants' fraud, First Nationwide on September 30, 1991 took reserves against the Crown Equities Loan in the amount of $1,050,000. The reserve amount is equal to the outstanding balance due on the Crown Equities Loan as of September 30, 1991 (including negative escrow accounts) less the current value of the property securing the Crown Equities Loan. But for defendants' fraud, First Nationwide Bank would have loaned only approximately $1,350,000, the outstanding balance due on the loan would be not greater than $1,325,000, and, accordingly, no reserves would have been taken. Thus, of the total reserve taken by First Nationwide on the Crown Equities Loan, $1,050,000, equal to the difference between the amount First Nationwide reserved and the amount First Nationwide would have reserved in the absence of defendants' fraud, is the amount of

the reserve directly and proximately attributable to the defendants' fraud. First Nationwide was required to reduce its assets and liabilities to maintain its regulatory base capital requirement of 4% to compensate for the reserve it took on the Crown Equities Loan. First Nationwide has incurred and will continue to incur additional losses of approximately $504,000 per annum because of defendants' fraud.

96. The 273 Realty Loan of April, 1989

(a) On April 13, 1989, First Nationwide made a loan in the amount of $500,000 to defendant 273 Realty Associates, a New York general partnership whose general partner were and are defendants Menachem Halberstam and Mordechai Halberstam, to refinance mortgages on a multi-unit apartment building at 273 East 10th Street, New York, New York (the "273 Realty Loan"). Gelt acted as the mortgage broker representing 273 Realty Associates in connection with the 273 Realty Loan.

(b) First Nationwide incorporates herein by reference the allegations of paragraphs 60 through 70, as though set forth in full with respect specifically to the 273 Realty Loan.

(c) First Nationwide is informed and believes, and on that basis alleges, that Gelt and 273 Realty Associates misrepresented the net operating income ("NOI") for the property securing the 273 Realty Loan. On information and belief, First Nationwide alleges that the NOI for the property securing the 273 Realty Loan in 1989 was approximately $51,000, that Gelt and 273 Realty Associates knew this, that they misrepresented to First Nationwide that the annual NOI in 1989 was approximately $84,000, or 164% of the actual NOI because they knew that First Nationwide would consider the annual NOI material in valuing the property and in determining whether to make the 273 Realty Loan and in determining the amount and other terms of the 273 Realty Loan.

(d) In particular, First Nationwide is informed and believes, and on that basis alleges, that the annual gross rental income for the property in 1989 was approximately $97,000, that Gelt and 273 Realty Associates knew this and that they misrepresented to First Nationwide that the annual gross rental income in 1989 was approximately $130,000 (or 134% of the actual income) because they knew that First Nationwide would consider the annual gross rental income material in valuing the property and in determining whether to make the 273 Realty Loan and in determining the amount and other terms of the 273 Realty Loan.

(e) As a direct, foreseeable and intended consequence of the defendants' deliberate overstatement of gross and net income, the value attributed to the property securing the 273 Realty Loan by First Nationwide was significantly greater than the actual value of the property at the time. Based on the information provided by Gelt and 273 Realty Associates, First Nationwide concluded that the property located at 273 East 10th Street, New York, New York was worth $780,000, and thus that the ratio of the loan amount to the value of the property securing the 273 Realty Loan (the "LTV ratio") was 64%, and that the ratio of the property's net operating income to the debt service obligations of 273 Realty Associates (the "DSC ratio") was 1.47. In fact, at the time the loan was made, the value of the property securing the loan was approximately $480,000, 38% less than what First Nationwide believed it to be based on the defendants' misrepresentations. As a consequence, the actual LTV and DSC ratios for the loan were approximately 104% and 0.90, respectively.

(f) Had First Nationwide known that the actual value of the property was only $480,000, and that the actual LTV and DSC ratios for the loan were approximately 104% and 0.90, respectively, First Nationwide would not have made the 273 Realty Loan. If First Nationwide had known the true facts, the most that First Nationwide would have loaned to 273 Realty

Associates to refinance the property located at 273 East 10th Street, New York, New York was $340,000.

(g) After the 273 Realty Associates Loan went into default, First Nationwide foreclosed upon the loan at a loss to First Nationwide of approximately $355,000.

(h) If First Nationwide had known the true facts at the time that it made the 273 Realty Loan, it would not have suffered any of this $355,000, because it would either not have made the loan at all, or would have made a loan of approximately $340,000, which would not have gone into default and which would not have been foreclosed upon at a loss to First Nationwide because the current value of the property is estimated to be $360,000.

(i) As a consequence of First Nationwide's loss on the 273 Realty Loan, First Nationwide was required to reduce its assets and liabilities in order to maintain its regulatory capital base requirement of 4%, and has incurred additional losses of approximately $696,000 per annum because of the defendants' fraud.

97. The Bonetto Realty Loan

(a) On June 29, 1989, First Nationwide made a loan in the amount of $1,300,000 to defendant Bonetto Realty Corp., a New York corporation, to finance the purchase of a multi-unit apartment building at 712 East 27th Street, Brooklyn, New York (the "Bonetto Realty Loan"). Gelt acted as the mortgage broker representing Bonetto Realty Corp. in connection with the Bonetto Realty Loan.

(b) First Nationwide incorporates herein by reference the allegations of paragraphs 60 through 70, as though set forth in full with respect specifically to the Bonetto Realty Loan.

(c) First Nationwide is informed and believes, and on that basis alleges, that at the time of the loan Gelt and Bonetto Realty Corp. intend that Bonetto Realty Corp. would obtain additional financing secured by the property located at 712 East 27th Street, Brooklyn, New York, that Gelt and Bonetto Realty Corp. knew that the loan agreement between Bonetto Realty Corp. and First Nationwide expressly forbade such additional financing, and that they intentionally concealed from First Nationwide their intent to obtain such additional financing because they knew that First Nationwide would consider it material in determining whether to make the Bonetto Realty Loan and in determining the amount and other terms of the Bonetto Realty Loan. In fact, without the knowledge or consent of First Nationwide, and in violation of the loan agreement with First Nationwide, Bonetto Realty Corp. did obtain additional financing, secured by the property, in the amount of $250,000, at about the same time that it received the Bonetto Realty Loan from First Nationwide. The additional financing was obtained from Campus Realty Associates, an affiliate of defendant Gross.

(d) First Nationwide is informed and believes, and on that basis alleges, that Gelt submitted forged loan application documents on behalf of Bonetto Realty Corp., including without limitation, the loan application, the personal financial statements for the principals of the borrower, and the schedule of other real estate investments for the principals of the borrower.

(e) As a direct, foreseeable and intended consequence of the defendants' deliberate concealment of the fact that Bonetto Realty Corp. was obtaining secondary financing, the value attributed to the property securing the Bonetto Realty Loan by First Nationwide was significantly greater than the actual value of the property at the time. Based on the information provided by Gelt and Bonetto Realty Corp., First Nationwide concluded that the property located at 712 East 27th

Street, Brooklyn, New York was worth $1,810,000, and thus that the ratio of the loan amount to the value of the property securing the Bonetto Realty Loan (the "LTV ratio") was approximately 72%, and that the ratio of the property's net operating income to the debt service obligations of Bonetto Realty Corp. (the "DSC ratio") was approximately 1.25. In fact, at the time the loan was made, the value of the property securing the loan was approximately $1,810,000, 2% less than what First Nationwide believed it to be based on the defendants' misrepresentations, and Bonetto Realty Corp. had secretly taken on additional debt secured by the property in the amount of approximately $250,000. As a consequence, the actual LTV and DSC ratios for the loan were 86% and 1.07 respectively.

(f) Had First Nationwide known that the actual value of the property located at address was only $1,400,000, that Bonetto Realty Corp. intended to secretly take on additional debt in violation of its loan agreement with First Nationwide, and that the actual LTV and DSC ratios for the loan were 86% and 1.07, respectively, First Nationwide would not have made the Bonetto Realty Loan. If First Nationwide had known the true facts, the most that First Nationwide would have loaned to Bonetto Realty Corp. to finance the purchase of the property located at 712 East 27th Street, Brooklyn, New York, was $1,050,000.

(g) On or about September, 1991, Bonetto Realty Corp. failed to make a required payment of principal and interest as required under the loan agreement. As of December 1, 1992, the total amount outstanding on the Bonetto Realty Loan was $1,494,000, and the amount that would have to be paid to First Nationwide to cure all defaults under the loan and to reinstate the loan was $309,000.

(h) In particular, based on First Nationwide's most recent appraisal of the property located at 712 East 27th Street,

Brooklyn, New York, the value of the property securing the Bonetto Realty Loan is approximately $1,400,000. Accordingly, First Nationwide has suffered a loss in connection with the Bonetto Realty Loan of approximately $94,000, the difference between the outstanding balance on the Bonetto Realty Loan and the current value of the property securing the Bonetto Realty Loan. If First Nationwide had known the true facts at the time it made the loan, it would not have suffered at least a portion of this loss, because it would either not have made the loan at all, or would have made a loan of only $1,050,000, and because the loan would not have gone into default as a result of Bonetto Realty Corp. over-leveraging the property. Thus, of this loss suffered by First Nationwide on the Bonetto Realty Loan, $94,000, the difference between the amount First Nationwide has lost and the estimated amount First Nationwide would have lost in the absence of defendants' fraud, represents the portion of First Nationwide's loss attributable to the defendants' fraud in connection with the Bonetto Realty Loan.

(i) As a consequence of the defendants' fraud, First Nationwide on September 30, 1991 took reserves against the Bonetto Realty Loan in the amount of $162,000. The reserve amount is equal to the outstanding balance due on the Bonetto Realty Loan as of September 30, 1991 (including negative escrow accounts), less the estimated current value of the property securing the Bonetto Realty Loan. But for defendants' fraud, First Nationwide Bank would have loaned only approximately $1,050,000, the outstanding balance due on the loan would be not greater than $1,042,000, and, accordingly, no reserves would have been taken. Thus, of the total reserve taken by First Nationwide on the Bonetto Realty Loan, $162,000, equal to the difference between the amount First Nationwide reserved and the amount First Nationwide would have reserved in the absence of defendants' fraud, is the amount of the reserve directly and proximately attributable to the defendants' fraud. First Nationwide was required to

reduce its assets and liabilities to maintain its regulatory capital base requirements of 4% to compensate for the reserves it took on the Bonetto Realty Loan. First Nationwide has incurred and will continue to incur additional losses of approximately $78,000 per annum because of the defendants' fraud.

98. The Cavaliero Realty Loan

(a) On June 29, 1989, First Nationwide made a loan in the amount of $1,400,000 to Cavaliero Realty Corp., a New York corporation, to finance the purchase of a multi-unit apartment building at 723 East 27th Street, Brooklyn, New York (the "Cavaliero Realty Loan"). Gelt acted as the mortgage broker representing Cavaliero Realty Corp. in connection with the Cavaliero Realty Loan.

(b) First Nationwide incorporates herein by reference the allegations of paragraphs 60 through 70, as though set forth in full with respect specifically to the Cavaliero Realty Loan.

(c) First Nationwide is informed and believes, and on that basis alleges, that at the time of the loan Gelt and Cavaliero Realty Corp. intended that Cavaliero Realty Corp. would obtain additional financing secured by the property located at 723 East 27th Street, Brooklyn, New York, that Gelt and Cavaliero Realty Corp. knew that the loan agreement between Cavaliero Realty Corp. and First Nationwide expressly forbade such additional financing, and that they intentionally concealed from First Nationwide their intent to obtain such additional financing because they knew that First Nationwide would consider it material in determining whether to make the Cavaliero Realty Loan and in determining the amount and other terms of the Cavaliero Realty Loan. In fact, without the knowledge or consent of First Nationwide, and in violation of the loan agreement with First Nationwide, Cavaliero Realty Corp. did obtain additional financing, secured by the property,

in the amount of $300,000, at about the same time that it received the Cavaliero Realty Loan from First Nationwide. The additional financing was obtained from College Realty Associates, an affiliate of defendant Gross.

(d) First Nationwide is informed and believes, and on that basis alleges, that Gelt submitted forged loan application documents on behalf of Cavaliero Realty Corp., including, without limitation, the loan application, the personal financial statements for the principals of the borrower, and the schedule of other real estate investments for the principals of the borrower.

(e) As a direct, foreseeable and intended consequence of the defendants' deliberate concealment of the fact that Cavaliero Realty Corp. was obtaining secondary financing, the value attributed to the property securing the Cavaliero Realty Loan by First Nationwide was significantly greater than the actual value of the property at the time. Based on the information provided by Gelt and Cavaliero Realty Corp., First Nationwide concluded that the property located at 723 East 27th Street, Brooklyn, New York was worth $1,975,000, and thus that the ratio of the loan amount to the value of the property securing the Cavaliero Realty Loan (the "LTV ratio") was 71%, and that the ratio of the property's net operating income to the debt service obligations of Cavaliero Realty Corp. (the "DSC ratio") was 1.17. In fact, at the time the loan was made, the value of the property securing the loan was approximately $1,980,000, 2.3% less than what First Nationwide believed it to be based on the defendants' misrepresentations, and Cavaliero Realty Corp. had secretly taken on additional debt secured by the property in the amount of approximately $300,000. As a consequence, the actual LTV and DSC ratios for the loan were 86% and 0.99 respectively.

(f) Had First Nationwide known that the actual value of the property located at address was only $1,600,000, that

Cavaliero Realty Corp. intended to secretly take on additional debt in violation of its loan agreement with First Nationwide, and that the actual LTV and DSC ratios for the loan were 86% and 0.99, respectively, First Nationwide would not have made the Cavaliero Realty Loan. If First Nationwide had known the true facts, the most that First Nationwide would have loaned to Cavaliero Realty Corp. to finance the purchase of the property located at 723 East 27th Street, Brooklyn, New York was $1,100,000.

(g) On or about September, 1991, Cavaliero Realty Corp. failed to make a required payment of principal and interest as required under the loan agreement. As of December 1, 1992, the total amount outstanding on the Cavaliero Realty Loan was $1,569,000, and the amount that would have to be paid to First Nationwide to cure all defaults under the loan and to reinstate the loan was $327,000.

(h) As a consequence of the defendants' fraud, First Nationwide, on September 30, 1991, took reserves against the Cavaliero Realty Loan in the amount of $174,000. The reserve amount is equal to the outstanding balance due on the Cavaliero Realty Loan as of September 30, 1991 (including negative escrow accounts), less the estimated current value of the property securing the Cavaliero Realty Loan. But for defendants' fraud, First Nationwide Bank would have loaned only approximately $1,100,000, the outstanding balance due on the loan would be not greater than $1,094,000, and, accordingly, no reserves would have been taken. Thus, of the total reserve taken by First Nationwide on the Cavaliero Realty Loan, $174,000, equal to the difference between the amount First Nationwide reserved and the amount First Nationwide would have reserved in the absence of defendants' fraud, is the amount of the reserve directly and proximately attributable to the defendants' fraud. First Nationwide was required to reduce its assets and liabilities in order to maintain its regulatory base capital requirement of 4% to compensate

for the reserves it took on the Cavaliero Realty Loan. First Nationwide has incurred and will continue to incur additional losses of approximately $84,000 per annum because of the defendants' fraud.

99. The Verdin Realty Loan

(a) On June 29, 1989, First Nationwide made a loan in the amount of $1,300,000 to defendant Verdin Realty Corp., a New York corporation, to finance the purchase of a multi-unit apartment building at 2420 Glenwood Road, Brooklyn, New York (the "Verdin Realty Loan"). Gelt acted as the mortgage broker representing Verdin Realty Corp. in connection with the Verdin Realty Loan.

(b) First Nationwide incorporates herein by reference the allegations of paragraphs 60 through 70, as though set forth in full with respect specifically to the Verdin Realty Loan.

(c) First Nationwide is informed and believes, and on that basis alleges, that at the time of the loan Gelt and Verdin Realty Corp. intended that Verdin Realty Corp. would obtain additional financing secured by the property located at 2420 Glenwood Road, Brooklyn, New York, that Gelt and Verdin Realty Corp. knew that the loan agreement between Verdin Realty Corp. and First Nationwide expressly forbade such additional financing, and that they intentionally concealed from First Nationwide their intent to obtain such additional financing because they knew that First Nationwide would consider it material in determining whether to make the Verdin Realty Loan and in determining the amount and other terms of the Verdin Realty Loan. In fact, without the knowledge or consent of First Nationwide, and in violation of the loan agreement with First Nationwide, Verdin Realty Corp. did obtain additional financing, secured by the property, in the amount of $250,000, at about the same time that it received the Verdin Realty Loan from First Nationwide. The additional

financing was obtained from Glenbed Realty Associates, an affiliate of defendant Gross.

(d) First Nationwide is informed and believes, and on that basis alleges, that Gelt submitted forged loan application documents on behalf of Verdin Realty Corp., including, without limitation, the loan application, the personal financial statements for the principals of the borrower, and the schedule of other real estate investments for the principals of the borrower.

(e) As a direct, foreseeable and intended consequence of the defendants' deliberate concealment of the fact that Verdin Realty Corp. was obtaining secondary financing, the value attributed to the property securing the Verdin Realty Loan by First Nationwide was significantly greater than the actual value of the property at the time. Based on the information provided by Gelt and Verdin Realty Corp., First Nationwide concluded that the property located at 2420 Glenwood Road, Brooklyn, New York was worth $1,815,000, and thus that the ratio of the loan amount to the value of the property securing the Verdin Realty Loan (the "LTV ratio") was 72%, and that the ratio of the property's net operating income to the debt service obligations of Verdin Realty Corp. (the "DSC ratio") was 1.17. In fact, at the time the loan was made, the value of the property securing the loan was approximately $1,820,000, 2% less than what First Nationwide believed it to be based on the defendants' misrepresentations, and Verdin Realty Corp. had secretly taken on additional debt secured by the property in the amount of approximately $250,000. As a consequence, the actual LTV and DSC ratios for the loan were 85% and 1.00 respectively.

(f) Had First Nationwide known that the actual value of the property located at address was only $1,250,000, that Verdin Realty Corp. intended to secretly take on additional debt in violation of its loan agreement with First Nationwide,

and that the actual LTV and DSC ratios for the loan were 85% and 1.00, respectively, First Nationwide would not have made the Verdin Realty Loan. If First Nationwide had known the true facts, the most that First Nationwide would have loaned to Verdin Realty Corp. to finance the purchase of the property located at 2420 Glenwood Road, Brooklyn, New York was $1,050,000.

(g) On or about September, 1991, Verdin Realty Corp. failed to make a required payment of principal and interest as required under the loan agreement. As of December 1, 1992, the total amount outstanding on the Verdin Realty Loan was $1,456,000, and the amount that would have to be paid to First Nationwide to cure all defaults under the loan and to reinstate the loan was $288,000.

(h) In particular, based on First Nationwide's most recent appraisal of the property located at 2420 Glenwood Road, Brooklyn, New York, the value of the property securing the Verdin Realty Loan is approximately $1,250,000. Accordingly, First Nationwide has suffered a loss in connection with the Verdin Realty Loan of approximately $206,000, the difference between the outstanding balance on the Verdin Realty Loan and the current value of the property securing the Verdin Realty Loan. If First Nationwide had known the true facts at the time it made the loan, it would not have suffered at least a portion of this loss, because it would either not have made the loan at all, or would have made a loan of only $1,050,000, and because the loan would not have gone into default as a result of Verdin Realty Corp. over-leveraging the property. Thus, of this loss suffered by First Nationwide on the Verdin Realty Loan, $206,000, the difference between the estimated amount First Nationwide has lost and the amount First Nationwide would have lost in the absence of defendants' fraud, represents the portion of First Nationwide's loss attributable to the defendants' fraud in connection with the Verdin Realty Loan.

(i) As a consequence of the defendants' fraud, First Nationwide, on September 30, 1991, took reserves against the Verdin Realty Loan in the amount of $203,000. The reserve amount is equal to the outstanding balance due on the Verdin Realty Loan as of September 30, 1991 (including negative escrow accounts), less the estimated current value of the property securing the Verdin Realty Loan. But for defendants' fraud, First Nationwide Bank would have loaned only approximately $1,050,000, the outstanding balance due on the loan would be not greater than $1,043,000, and, accordingly, no reserves would have been taken. Thus, of the total reserve taken by First Nationwide on the Verdin Realty Loan, $203,000, the difference between the amount First Nationwide reserved and the amount First Nationwide would have reserved in the absence of defendants' fraud, is the amount of the reserve directly and proximately attributable to the defendants' fraud. First Nationwide was required to reduce its assets and liabilities in order to maintain its regulatory base capital requirement of 4% to compensate for the reserves it took on the Verdin Realty Loan. First Nationwide has incurred and will continue to incur additional losses of approximately $97,000 per annum because of the defendants' fraud.

100. The Adar Two Realty Loan of August, 1989

(a) On August 28, 1989, First Nationwide made a loan in the amount of $8,300,000 to defendant Adar Two Realty Co., a New York general partnership whose general partners were and are defendants Joseph Friedman, Sol Gross (a/k/a Eugene Gross), David Malek, and Peter Rebenwurzel, to finance the purchase of multi-unit apartment buildings at 1670, 1690-91 East 174th Street, Bronx, New York (the "Adar Two Realty Loan"). Gelt acted as the mortgage broker representing Adar Two Realty Co. in connection with the Adar Two Realty Loan.

(b) First Nationwide incorporates herein by reference the allegations of paragraphs 60 through 70, as though set forth in full with respect specifically to the Adar Two Realty Loan.

(c) First Nationwide is informed and believes, and on that basis alleges, that Gelt and Adar Two Realty Co. misrepresented the net operating income ("NOI") for the property securing the Adar Two Realty Loan. On information and belief, First Nationwide alleges that the NOI for the property securing the Adar Two Realty Loan in 1989 was approximately $848,000, that Gelt and Adar Two Realty Co. knew this, that they misrepresented to First Nationwide that the annual NOI in 1989 was approximately $1,062,000 (or 125% of the actual NOI) because they knew that First Nationwide would consider the annual NOI material in valuing the property and in determining whether to make the Adar Two Realty Loan and in determining the amount and other terms of the Adar Two Realty Loan.

(d) In particular, First Nationwide is informed and believes, and on that basis alleges, that the annual gross rental income for the property in 1989 was approximately $1,556,000, that Gelt and Adar Two Realty Co. knew this and that they misrepresented to First Nationwide that the annual gross rental income in 1989 was approximately $1,769,000 (or 88% of the actual income) because they knew that First Nationwide would consider the annual gross rental income material in valuing the property and in determining whether to make the Adar Two Realty Loan and in determining the amount and other terms of the Adar Two Realty Loan.

(e) First Nationwide is informed and believes, and on that basis alleges, that Adar Two Realty Co. was buying the property through a flip transaction, that Gelt and Adar Two Realty Co. knew this, and that they intentionally concealed this fact from First Nationwide because they knew that First Nationwide would consider it material in valuing the property and in

determining whether to make the Adar Two Realty Loan and the amount and other terms of the Adar Two Realty Loan. In particular, Adar Two Realty Co. represented that it was purchasing the collateral property for $12,525,000, though the actual purchase price was $7,125,000, resulting in a profit to Adar Two Realty Co. on the flip of $5,400,000.

(f) As a direct, foreseeable and intended consequence of the Adar Two Realty Co.'s deliberate overstatement of gross and net income and deliberate concealment of the fact that Adar Two Realty Co. was acquiring the property through a flip transaction, the value attributed to the property securing the Adar Two Realty Loan by First Nationwide was significantly greater than the actual value of the property at the time. Based on the information provided by Gelt and Adar Two Realty Co., First Nationwide concluded that the property located at 1670, 1690-91 East 174th Street, Bronx, New York was worth $10,770,000, and thus that the ratio of the loan amount to the value of the property securing the Adar Two Realty Loan (the "LTV ratio") was 77%, and that the ratio of the property's net operating income to the debt service obligations of Adar Two Realty Co. (the "DSC ratio") was 1.12. In fact, at the time the loan was made, the value of the property securing the loan was approximately $8,6000,000, 20% less than what First Nationwide believed it to be based on the Adar Two Realty Co.'s misrepresentations. As a consequence, the actual LTV and DSC ratios for the loan were approximately 97% and 0.89, respectively.

(g) Had First Nationwide known that the actual value of the property located at address was only $8,600,000 and that the actual LTV and DSC ratios for the loan were 97% and 0.89, respectively, First Nationwide would not have made the Adar Two Realty Loan. If First Nationwide had known the true facts, the most that First Nationwide would have loaned to Adar Two Realty Co. to finance the purchase of the

property located at 1670, 1690-91 East 174th Street, Bronx, New York was $6,630,000.

(h) On or about December 1, 1990, Adar Two Realty Co. failed to make a required payment of principal and interest as required under the loan agreement. As of December 1, 1992, the total amount outstanding on the Adar Two Realty Loan was approximately $9,783,000, and the amount that would have to be paid to First Nationwide to cure all defaults under the loan and to reinstate the loan was $1,676,000.

(i) In particular, based on First Nationwide's most recent appraisal of the property located at 1670, 1690-91 East 174th Street, Bronx, New York, the value of the property securing the Adar Two Realty Loan is approximately $5,500,000. Accordingly, First Nationwide has suffered a loss in connection with the Adar Two Realty Loan of approximately $4,283,000, the difference between the outstanding balance on the Adar Two Realty Loan and the current value of the property securing the Adar Two Realty Loan. If First Nationwide had known the true facts at the time it made the loan, it would not have suffered at least a portion of this loss, because it would either not have made the loan at all, or would have made a loan of only $6,630,000. Thus, of this loss suffered by First Nationwide on the Adar Two Realty Loan, $3,192,000, the difference between the amount First Nationwide has lost and the estimated amount First Nationwide would have lost in the absence of Adar Two Realty Co.'s fraud, represents the portion of First Nationwide's loss attributable to the Adar Two Realty Co.'s fraud in connection with the Adar Two Realty Loan.

(j) As a consequence of the defendants' fraud, First Nationwide, on September 30, 1991, took reserves against the Adar Two Realty Loan in the amount of approximately $3,381,000. The reserve amount is equal to the outstanding balance due on the Adar Two Realty Loan as of September

30, 1991 (including negative escrow accounts), less the estimated current value of the property securing the Adar Two Realty Loan. But for Adar Two Realty Co.'s fraud, First Nationwide Bank would have loaned only approximately $6,630,000, the outstanding balance due on the loan would be not greater than approximately $6,592,000, and, accordingly, the reserve amount First Nationwide would have taken would have been approximately $1,092,000. Thus, of the total reserve taken by First Nationwide on the Adar Two Realty Loan, approximately $2,289,000, the difference between the amount First Nationwide reserved and the amount First Nationwide would have reserved in the absence of Adar Two Realty Co.'s fraud, is the amount of the reserve directly and proximately attributable to the Adar Two Realty Co.'s fraud. First Nationwide was required to reduce its assets and liabilities in order to maintain its regulatory base capital requirement of 4% to compensate for the reserves it took on the Adar Two Realty Loan. First Nationwide has incurred and will continue to incur additional losses of approximately $1,099,000 per annum because of the defendants' fraud.

101. First Nationwide has commenced actions in the courts of the State of New York to foreclose the mortgages securing repayment of certain of the Gelt Loans, including the New Heights (173-174) Limited Partnership Loan, the 505 Realty Loan, the New Heights 765 Riverside Limited Partnership Loan, the 730 Realty Loan, the 740 Realty Loan, the 2608 Realty Loan, the 2344 Davidson Associates Loan, the 273 Realty Loan, the Adar Two Realty Loan, the 100 Realty Company Loan, the Prospect Realty Loan, the Central Owners Loan, the 1958 Realty Loan, and the Brookhaven Realty Loan, and may commence additional foreclosure actions related to Gelt Loans in New York and elsewhere. In this action, First Nationwide does not seek to recover any part of the mortgage debt related to any Gelt Loan, but only to recover compensatory and other damages for the injury that it has

suffered as a direct and proximate result of the defendants' fraud, violations of RICO, and other tortious conduct.

Mail and Wire Fraud

102. First Nationwide is informed and believes, and on that basis alleges, that Gelt and the borrowers described in paragraphs 22 through 59 above sent First Nationwide various documents through the United States mail as part of the frauds. These documents are identified in Appendix B to this Complaint. In addition, First Nationwide is informed and believes, and on that basis alleges, that Gelt and the borrowers described in paragraphs 22 through 59 above used telephone lines as part of the frauds.

Gross's Representation of First Nationwide and Conflicts of Interest

103. Before about February 1987, First Nationwide retained Gross to act as First Nationwide's attorney in connection with the closing of Gelt Loans.

104. In late 1986, First Nationwide determined that it was inappropriate for Gross to act for First Nationwide as its attorney in connection the closing of Gelt loans, because of the conflict of interest inherent in Gross's dual role as attorney for First Nationwide and as principal shareholder and the president of Gelt. In early 1987, First Nationwide retained other attorneys to act for it in connection with the closings of commercial loans, including Gelt Loans. At Gelt's request, however, only one of those attorney handled the closings of Gelt Loans. From early 1987 until about November 1990, First Nationwide understood and believed that that attorney was regularly and conscientiously performing the duties of an attorney representing a financial institution in connection with the closing of commercial real estate loans with unswerving loyalty to his client, First Nationwide.

105. In fact, even after First Nationwide retained other attorneys to handle the closings, Gross, or his associates at his direction, but without First Nationwide's knowledge, effectively acted as First Nationwide's attorney for the closings of Gelt Loans. Gross did so by, among other things, manipulating or suborning First Nationwide's closing attorney and entering into a fee sharing agreement with that attorney.

106. First Nationwide is informed and believes, and on that basis alleges, that even after First Nationwide retained a separate closing attorney Gross continued to act as First Nationwide's attorney in connection with the closing of Gelt Loans, and, in particular:

a. Took responsibility for reviewing and completing the necessary documentation required for First Nationwide to approve a Gelt loan;

b. Controlled Gelt loan files before, during, and after loan closings;

c. Maintained custody of Gelt loan files at Gelt's offices;

d. Received a portion of the money disbursed at closing to pay First Nationwide's attorneys' fees.

107. First Nationwide is informed and believes, and on that basis alleges, that by virtue of Gross's conduct described above, Gross controlled First Nationwide's closing attorney in connection with Gelt Loans and improperly usurped that attorney's role, in order to facilitate the frauds described herein.

108. First Nationwide is informed and believes, and on that basis alleges, that Gross, with respect to certain Gelt Loans, was a borrower or the undisclosed principal of a borrower and submitted fraudulent financial statements to First

Nationwide in connection with loans that he sought for himself or for entities that he controlled.

109. First Nationwide is informed and believes, and on that basis alleges, that Gross, with respect to certain Gelt Loans, concealed his own financial interest in commercial properties for which his clients sought loans, as well as his interest in entities to which loan proceeds were paid to satisfy questionable prior liens or mortgages.

110. First Nationwide is informed and believes, and on that basis alleges, that Gross, with respect to certain Gelt Loans, obtained undisclosed second mortgages on the property securing the loan, even though he knew that First Nationwide's loan agreements prohibited such mortgages without First Nationwide's prior written consent.

111. By virtue of the conduct described above, Gross violated fiduciary, contractual, and professional obligations that he had to First Nationwide, and as a consequence First Nationwide has suffered injury.

FIRST CAUSE OF ACTION FOR VIOLATIONS OF RICO §§ 1962(c), 1962(d) (against defendants Gelt, Gross, and Herzka)

112. For the First Cause of Action, First Nationwide incorporates by reference paragraphs 1 through 111 of this complaint.

113. From as early as 1985 to today, Gross and Herzka have been individuals capable of holding a beneficial or legal interest in property; thus, during that time, each has been a "person" as that term is defined in 18 U.S.C. § 1961(c). First Nationwide is informed and believes, and on that basis alleges, that, from as early as 1985 to today, Gelt has been an entity capable of holding a beneficial or legal interest in property

and thus is a "person" as that term is defined in 18 U.S.C. § 1961(c).

114. First Nationwide is informed and believes, and on that basis alleges, that as early as 1985, and possibly earlier, through at least 1990, Gelt, Gross, and Herzka were associated in fact for the common purpose, among others, of defrauding First Nationwide through the loan transactions described in this complaint and other means. This association in fact was an "enterprise" (the "Gelt Enterprise") as that term is defined in 18 U.S.C. § 1961(4).

115. The Gelt Enterprise engaged in, and its activities affected, interstate commerce, because the Gelt Enterprise (a) conducted and participated in the buying and selling of real estate interests, which affected the interstate market for such interests, (b) operated in a federally regulated credit market, and (c) fraudulently induced First Nationwide, a federally regulated savings association, to make loans that it otherwise would not have made.

116. First Nationwide is informed and believes, and on that basis alleges, that Gelt, Gross, and Herzka were employed by or associated with the Gelt Enterprise.

117. As described in this complaint, over six years Gelt, Gross, and Herzka acted to defraud First Nationwide, a financial institution, by knowingly or recklessly misrepresenting material facts about various loan transactions. These frauds constituted repeated violations of 18 U.S.C. § 1344 relating to bank fraud and thus are also acts of racketeering activity under 18 U.S.C. § 1961(1)(B).

118. As described in this complaint, Gelt, Gross, and Herzka used the United States mails, or caused the mails to be used, to send documents in furtherance of the frauds against First Nationwide. (Almost 100 of the documents mailed over

a period of five years have been described specifically in Appendix A to this complaint.) These mailings and others constituted repeated violations of 18 U.S.C. § 1341 relating to mail fraud and thus are also acts of racketeering activity under 18 U.S.C. § 1961(1)(B).

119. The multiple instances of bank and mail fraud described above, spread over at least five years, all intended to defraud First Nationwide in connection with many different but similar loan transactions, constitute a "pattern of racketeering activity" as that term is defined in 18 U.S.C. § 1961(5).

120. First Nationwide is informed and believes, and on that basis alleges, that Gelt, Gross, and Herzka each conducted and participated, directly and indirectly, in the conduct of the affairs of the Gelt Enterprise through the pattern of racketeering activities described above, in violation of 18 U.S.C. § 1962(c). First Nationwide is informed and believes, and on that basis alleges, that Gelt, Gross, and Herzka agreed to violate 18 U.S.C. § 1962(c) as set forth above, or knowingly and substantially participated in that violation. As such, these defendants aided and abetted the commission of the RICO violation described above and thus are liable for the damages proximately resulting from all the misrepresentations described above.

121. First Nationwide is informed and believes, and on that basis alleges, that Gelt, Gross, and Herzka each, in violation of 18 U.S.C. § 1961(d), conspired with others to violate 18 U.S.C. § 1962(c).

122. As a direct and proximate result of these violations of 18 U.S.C. §§ 1962(c) and (d), Gelt, Gross, and Herzka have injured First Nationwide's property and business in an amount to be proven, plus interest as allowed by law.

SECOND CAUSE OF ACTION FOR VIOLATIONS OF RICO §§ 1962(c), 1962(d) (against all defendants)

123. For the Second Cause of Action, First Nationwide incorporates by reference paragraphs 1 through 122 of this complaint.

124. First Nationwide is informed and believes, and on that basis alleges, that, from as early as 1985 to today, all the defendants have been entities or individuals capable of holding a beneficial or legal interest in property and thus each is a "person" as that term is defined in 18 U.S.C. § 1961(c).

125. First Nationwide is informed and believes, and on that basis alleges, that at various times as early as 1985, and possibly earlier, through at least 1990, Gelt, Gross, Herzka, and all the other defendants were associated in fact for the common purpose, among others, of defrauding First Nationwide through the loan transactions described in this complaint and other means. This association in fact was an "enterprise" (the "Borrower Enterprise") as that term is defined in 18 U.S.C. § 1961(4).

126. The Borrower Enterprise engaged in, and its activities affected, interstate commerce, because the Borrower Enterprise (a) conducted and participated in the buying and selling of real estate interests, which affected the interstate market for such interests, (b) operated in a federally chartered credit market, and (c) fraudulently induced First Nationwide, a federally chartered savings association, to make loans that it otherwise would not have made.

127. First Nationwide is informed and believes, and on that basis alleges, that Gelt, Gross, Herzka, and all the other defendants were employed by or associated with the Borrower Enterprise.

128. As described in this complaint, over six years Gelt, Gross, Herzka, and all the other defendants acted to defraud First Nationwide, a financial institution, by knowingly or recklessly misrepresenting material facts about various loan transactions. These frauds constituted repeated violations of 18 U.S.C. § 1344 relating to bank fraud and thus are also acts of racketeering activity under 18 U.S.C. § 1961(1)(B).

129. As described in this complaint, Gelt, Gross, Herzka, and all the other defendants used the United States mails, or caused the mails to be used, to send documents in furtherance of the frauds against First Nationwide. (Almost 100 of the documents mailed over a period of five years have been described specifically in Appendix B to this complaint.) These mailings and others constituted repeated violations of 18 U.S.C. § 1341 relating to mail fraud and thus are also acts of racketeering activity under 18 U.S.C. Section 1961(1)(B).

130. The multiple instances of bank and mail fraud described above, spread over at least five years, all intended to defraud First Nationwide in connection with many different loan transactions, constitute a "pattern of racketeering activity" as that term is defined in 18 U.S.C. § 1961(5).

131. First Nationwide is informed and believes, and on that basis alleges, that Gelt, Gross, Herzka, and all the other defendants each conducted and participated, directly and indirectly, in the conduct of the affairs of the Borrower Enterprise through the pattern of racketeering activities described above, in violation of 18 U.S.C. § 1962(c). First Nationwide is informed and believes, and on that basis alleges, that Gelt, Gross, Herzka, and all the other defendants agreed to violate 18 U.S.C. § 1962(c) as set forth above, or knowingly and substantially participated in that violation. As such, these defendants aided and abetted the commission of the RICO violation described above and thus are liable for the damages

proximately resulting from all the misrepresentations described above.

132. First Nationwide is informed and believes, and on that basis alleges, that Gelt, Gross, Herzka, and all the other defendants each, in violation of 18 U.S.C. § 1961(d), conspired with others to violate 18 U.S.C. § 1962(c).

133. As a direct and proximate result of these violations of 18 U.S.C. §§ 1962(c) and (d), Gelet, Gross, Herzka, and all the other defendants have injured First Nationwide's property and business in an amount to be proven, plus interest as allowed by law.

THIRD CAUSE OF ACTION FOR FRAUD
(against all defendants)

134. Plaintiff repeats and reallege each of the allegations of paragraphs 1 through 133 above, as though fully set forth herein.

135. Gelt, Gross, and Herzka knowingly misrepresented material facts about loans being sought from First Nationwide, concealed material facts and engaged in conduct with the intention and for the purpose of deceiving First Nationwide with respect to, among other things, the gross and net operating incomes and purchase prices of the properties securing the loans identified herein at paragraphs 71 through 100, the true nature of the transactions pursuant to which borrowers acquired the properties securing the loans identified in paragraphs 71 through 100, and the additional financing secured by the collateral properties which secured the loans identified in paragraphs 71 through 100, and the additional financing secured by the collateral properties which secured the loans identified in paragraphs 71 through 100.

136. First Nationwide is informed and believes, and on that basis alleges, that Gelt, Gross, and Herzka agreed to make or to the making of the misrepresentations made in connection with the fraudulent loans, and each substantially and knowingly participated in the execution of a scheme to defraud First Nationwide in connection with the fraudulent loans. First Nationwide is informed and believes, and on this basis alleges, that Gelt, Gross, and Herzka also directed, caused, and encouraged the other defendants to this cause of action to make or aid and abet the making of the misrepresentations made in connection with the fraudulent loans. Based on these allegations, Gelt, Gross, and Herzka conspired to commit or aided and abetted the commission of the frauds described above and thus are liable for all damages proximately cause by the misrepresentations made in connection with each of the fraudulent loans.

137. First Nationwide is informed and believes, and on that basis alleges, that, for each of the fraudulent loans, the borrower, and for each borrower that was a partnership, the partners named as defendants in this complaint, agreed to make or to the making of the misrepresentations made in connection with that borrower's loan and substantially and knowingly participated in the execution of a scheme to defraud First Nationwide in connection with that loan. As such, for each of the fraudulent loans, the borrower, and for each borrower that was a partnership, the partners named as defendants in this complaint, conspired to commit or aided and abetted the fraud committed in connection with the borrower's loan and thus are liable for all damages proximately caused by the misrepresentations made in connection with the borrower's loan.

138. All the defendants knew that the material facts that were misrepresented and concealed were material to First Nationwide in determining whether to make the loans described in paragraphs 71 through 100 above.

139. First Nationwide reasonably believed defendants' misrepresentations to be true and, justifiably relying on them, made the loans identified in paragraphs 71 through 100 above.

140. First Nationwide did not discover the misrepresentations made by defendants until 1991.

141. As a direct and proximate result of the foregoing, First Nationwide has been damaged in an amount to be determined. First Nationwide is entitled to judgment against each of the defendants, jointly and severally, in an amount to be determined together with and additional exemplary damages, plus costs, attorneys' fees and interest as permitted by law.

FOURTH CAUSE OF ACTION FOR CONSPIRACY TO DEFRAUD
(against all defendants)

142. Plaintiff repeats and reallege each of the allegations of paragraphs 1 through 143 above, as if fully set forth herein.

143. Gelt, Gross, and Herzka knowingly misrepresented material facts about loans being sought from First Nationwide, concealed material facts and engaged in conduct with the intention and for the purpose of deceiving First Nationwide with respect to the gross and net operating incomes and purchase prices of the properties securing the loans identified herein at paragraphs 71 through 100, the true nature of the transactions pursuant to which borrowers acquired the properties securing the loans identified in paragraphs 71 through 100, and the additional financing secured by the collateral properties which secured the loans identified in paragraphs 71 through 100.

144. Gelt, Gross, and Herzka joined together, combined and conspired to engage in the frauds and the misrepresentations

described in paragraphs 71 through 100 with the common understanding and agreement that they would actively and materially deceive First Nationwide. Upon information and belief, in furtherance of this common understanding and agreement, and with the purpose and intent of injuring First Nationwide, the defendants did engage in the fraudulent and unlawful acts alleged above.

145. First Nationwide is informed and believes, and on that basis alleges, that Gelt, Gross, and Herzka agreed to make or to the making of the misrepresentations made in connection with the fraudulent loans, and each substantially and knowingly participated in the execution of a scheme to defraud First Nationwide in connection with the fraudulent loans. First Nationwide is informed and believes, and on this basis alleges, that Gelt, Gross, and Herzka also directed, caused, and encouraged the others defendants to this cause of action to make or aid and abet the making of the misrepresentations made in connection with the fraudulent loans. Based on these allegations, Gelt, Gross, and Herzka conspired to commit or aided and abetted the commission of the frauds described above and thus are liable for all damages proximately caused by the misrepresentations made in connection with each of the fraudulent loans.

146. First Nationwide is informed and believes, and on that basis alleges, that, for each of the fraudulent loans, the borrower, and for each borrower that was a partnership the partners named as defendants in this complaint, agreed to make or to the making of the misrepresentations made in connection with that borrower's loan and substantially and knowingly participated in the execution of a scheme to defraud First Nationwide in connection with that loan. As such, for each of the fraudulent loans, the borrower, and for each borrower that was a partnership the partners named as defendants in this complaint, conspired to commit or aided and abetted the fraud committed in connection with the borrower's

loan and thus are liable for all damages proximately caused by the misrepresentations made in connection with the borrower's loan.

147. First Nationwide did not discover the misrepresentations made to it by defendants until 1991.

148. As a direct and proximate result of the foregoing, First Nationwide has been damaged in an amount to be determined. First Nationwide is entitled to judgment against each of the defendants, jointly and severally, in an amount to be determined together with additional exemplary damages, plus costs, including attorneys' fees, and interest as permitted by law.

FIFTH CAUSE OF ACTION FOR NEGLIGENT MISREPRESENTATION
(against Gelt, Gross, and Herzka)

149. Plaintiff repeats and reallege each of the allegations of paragraphs 1 through 148 above, as if fully set forth herein.

150. Gelt, Gross, and Herzka misrepresented material facts about loans being sought from First Nationwide, concealed material facts and engaged in conduct with the intention and for the purpose of deceiving First Nationwide with respect to the gross and net operating incomes and purchase prices of the properties securing the loans identified herein at paragraphs 71 through 100, the true nature of the transactions pursuant to which borrowers acquired the properties securing the loans identified in paragraphs 71 through 100, and the additional financing secured by the collateral properties which secured the loans identified in paragraphs 71 through 100.

151. Gelt, Gross, and Herzka made such representations without any reasonable ground for believing them to be true. Gelt, Gross, and Herzka made such representations for the

purpose of inducing First Nationwide to rely on them and to act or refrain from acting in reliance on them.

152. Gelt, Gross, and Herzka knew or should have known that the facts they negligently misrepresented and concealed were material facts to First Nationwide in determining whether to make the loans described in paragraphs 71 through 100, above.

153. First Nationwide believed defendants' representations to be true, acted in reasonable reliance on them and was deceived by defendants' misrepresentation and concealment of material facts.

154. First Nationwide did not discover the negligent misrepresentation practiced upon it by defendants until 1991.

155. As a direct and proximate result of the foregoing, First Nationwide has been damaged in an amount to be determined. First Nationwide is entitled to judgment against each of the defendants, jointly and severally, in an amount to be determined plus costs, including attorneys fees and interest as permitted by law.

SIXTH CAUSE OF ACTION FOR CONVERSION
(against all defendants)

156. Plaintiff repeats and reallege each of the allegations of paragraphs 1 through 169 above, as if fully set forth herein.

157. In connection with the transactions alleged above, Gelt, Gross, Herzka and all the other defendants through fraud and deception did deprive First Nationwide of the possession and ownership of money rightfully belonging to First Nationwide, thereby misappropriating and converting First Nationwide's money to their own use and benefit.

158. Defendants' unlawful exercise of dominion and control over First Nationwide's money constitutes conversion and has caused injury to First Nationwide.

159. As a direct and proximate result of the foregoing, First Nationwide has been damaged in an amount to be determined. First Nationwide is entitled to judgment against each of the defendants, in an amount to be determined together with additional exemplary damages, plus costs, including attorneys, fees, and interest as permitted by law.

SEVENTH CAUSE OF ACTION FOR CONSPIRACY TO CONVERT
(against all defendants)

160. Plaintiff repeats and reallege each of the allegations of paragraphs 1 through 159 above, as if fully set forth herein.

161. Gelt. Gross, Herzka and all the other defendants knowingly combined, conspired and agreed to convert money belonging to First Nationwide.

162. In furtherance of this conspiracy, and to effectuate its purposes, the defendants, with intent to deprive First Nationwide of its property, did engage in the fraudulent and unlawful acts alleged above, thereby misappropriating and converting property of First Nationwide.

163. The defendants' misappropriation and conversion of First Nationwide's property and their conspiracy for that purpose have caused injury to First Nationwide.

164. As a direct and proximate result of the foregoing, First Nationwide has been damaged in an amount to be determined. First Nationwide is entitled to judgment against each of the defendants, jointly and severally, in an amount to be determined together with additional exemplary damages,

plus costs, including attorneys, fees, and interest as permitted by law.

EIGHTH CAUSE OF ACTION FOR UNJUST ENRICHMENT
(against all defendants)

165. Plaintiff repeats and reallege each of the allegations of paragraphs 1 through 159 above, as if fully set forth herein.

166. As a direct and proximate result of their fraudulent conduct, misrepresentations and conversion, Gelt, Gross, Herzka and all the other defendants have been unjustly enriched in an amount not less than the sum of the total loan proceeds disbursed by First Nationwide to defendants in the transactions alleged above.

167. As a result of their unjust enrichment, to the detriment of First Nationwide, defendants should be required to make restitution to First Nationwide in an amount to be proved at trial.

NINTH CAUSE OF ACTION FOR BREACH OF FIDUCIARY DUTY
(against defendant Gross)

168. Plaintiff repeats and reallege each of the allegations of paragraphs 1 through 167, as if fully set forth herein.

169. As a fiduciary and attorney, Gross owed First Nationwide an undivided duty of loyalty.

170. In violation of his fiduciary duty toward First Nationwide, Gross entered into business transactions with First Nationwide and knowingly acquired pecuniary interests adverse to First Nationwide without fully disclosing and obtaining First Nationwide's written consent to such conduct.

171. Gross's actions constituted a breach of his fiduciary and ethical duties to First Nationwide.

172. As a direct and proximate result of Gross's breach of his fiduciary duties to First Nationwide, First Nationwide has been damaged in an amount to be determined. First Nationwide is entitled to judgment against Gross in an amount to be determined plus additional exemplary damages, plus costs, attorneys fees, and interest as permitted by law.

Jury Trial Demand

First nationwide demands a trial by jury on all causes of action alleged in this complaint.

WHEREFORE, First Nationwide prays for relief as follows:

AS TO THE FIRST CAUSE OF ACTION

For compensatory damages in an amount to be determined according to proof, plus interest allowed by law, that amount to be trebled according to 18 U.S.C. § 1964(c); and

For attorneys' fees and costs according to 18 U.S.C. § 1964 (c).

AS TO THE SECOND CAUSE OF ACTION

For compensatory damages in an amount to be determined according to proof, plus interest allowed by law, that amount to be trebled according to 18 U.S.C. § 1964(c);

For attorneys' fees and costs according to 18 U.S.C. § 1964 (c).

AS TO THE THIRD CAUSE OF ACTION

For compensatory damages in an amount to be determined according to proof, plus costs and interest allowed by law; and

For exemplary damages.

AS TO THE FOURTH CAUSE OF ACTION

For compensatory damages in an amount to be determined, according to proof, plus costs and interest allowed by law; and

For exemplary damages.

AS TO THE FIFTH CAUSE OF ACTION

For compensatory damages in an amount to be determined, according to proof, plus costs and interest allowed by law.

AS TO THE SIXTH CAUSE OF ACTION

For compensatory damages in an amount to be determined, according to proof, plus costs and interest allowed by law.

AS TO THE SEVENTH CAUSE OF ACTION

For compensatory damages in an amount to be determined, according to proof, plus costs and interest allowed by law.

AS TO THE EIGHTH CAUSE OF ACTION

For compensatory damages in an amount to be determined, according to proof, plus costs and interest allowed by law.

AS TO THE NINTH CAUSE OF ACTION

For compensatory damages in an amount to be determined, according to proof, plus costs and interest allowed by law; and

For exemplary damages.

AS TO ALL CAUSES OF ACTION

For such other relief as the Court may deem just and proper.

DATED: December 23, 1992
New York, New York

SCHULTE ROTH & ZABEL

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APPENDIX A

APPENDIX A
Page 1

¶	Loan	Loan Amount	Loan Date	Status	Amount to Cure	Misrepresentations: Overstated NOI?	Concealed Flip?	Concealed Financing?	Debt Service Coverage Ratio: Represented	Debt Service Coverage Ratio: Actual	Loan to Value Ratio: Represented	Loan to Value Ratio: Actual
71	100 Realty Company	$485,000	12/13/85	In Foreclosure	$105,069	YES			1.29	0.39	0.57	1.87
72	212 E 13th St.	$475,000	5/20/86	Restructured	N/A	YES			1.28	0.54	0.68	1.58
73	455 West 34th St	$4,000,000	12/8/86	In Bankruptcy	$1,123,547	YES			0.97	0.60	0.80	1.30
74	4395 Broadway Owners	$1,500,000	4/9/87	Loan Sold	N/A	YES			1.33	0.65	0.75	1.55
75	625 Marlborough	$725,000	8/11/87	Restructured	N/A	YES			1.18	0.89	0.68	0.87
76	43-25 43rd Owners	$1,500,000	9/2/87	Loan Sold	N/A	YES			1.02	0.46	0.75	1.65
77	Ditmas	$1,100,000	9/14/87	Restructured	N/A	YES			1.15	0.52	0.76	1.67
78	New Heights (173-174)	$4,000,000	11/19/87	In Foreclosure	$1,096,672	YES			1.03	0.72	0.75	1.06
79	505 Realty	$1,050,000	12/29/87	In Foreclosure	$245,013	YES	YES		1.20	1.01	0.72	0.88
80	Prospect Realty	$1,600,000	12/29/87	In Foreclosure	$223,302	YES			1.07	0.74	0.78	1.13
81	N.H. 765 Riverside	$2,800,000	1/6/88	In Foreclosure	$663,066	YES			1.09	0.58	0.74	1.37
82	1691 Eastburn Realty	$700,000	1/12/88	In Bankruptcy	$168,874	YES			1.34	1.04	0.70	0.90
83	4315-4333 46th St Apt	$3,500,000	1/14/88	Restructured	N/A	YES			1.12	0.53	0.78	1.64
84	Flatbush Avenue Realty	$8,000,000	3/7/88	Restructured	N/A	YES	YES		1.09	0.71	0.76	1.17
85	730 Realty	$1,550,000	5/18/88	In Bankruptcy	$556,689	YES	YES	YES	1.12	0.66	0.78	1.25
86	740 Realty	$1,550,000	5/18/88	In Bankruptcy	$511,070	YES	YES	YES	1.11	0.62	0.78	1.31
87	1261 Central Avenue	$2,500,000	5/18/88	In Foreclosure	$411,790	YES		YES	1.05	0.46	0.71	1.64
88	2608 Realty Associates	$1,100,000	8/25/88	In Foreclosure	$376,807	YES			1.28	0.77	0.75	1.25

APPENDIX A
Page 1

¶	Loan	Loan Amount	Loan Date	Status	Amount to Cure	Misrepresentations: Overstated NOI?	Concealed Flip?	Concealed Financing?	Debt Service Coverage Ratio: Represented	Actual	Loan to Value Ratio: Represented	Actual
89	36 Plaza Street	$2,700,000	8/30/88	In Bankruptcy	$373,960	YES	YES		1.02	0.58	0.77	1.35
90	1958 Realty	$1,000,000	10/5/88	In Foreclosure	$271,418	YES			1.00	0.60	0.77	1.28
91	2344 Davidson	$1,500,000	10/12/88	Loan Sold	N/A	YES			1.25	0.98	0.75	0.96
92	43-01 46th Street Owners	$1,400,000	10/18/88	Loan Sold	N/A	YES			1.10	0.40	0.70	1.92
93	Brookhaven Realty	$1,450,000	11/30/88	In Bankruptcy	$219,555	YES	YES		1.04	0.66	0.73	1.14
94	350 Sterling Associates	$2,300,000	11/30/88	In Bankruptcy	$416,017	YES	YES		1.21	0.87	0.79	1.11
95	N.H. Crown Equities	$2,700,000	12/29/88	In Foreclosure	$862,157	YES	YES	YES	1.26	0.73	0.72	1.28
96	273 Realty Associates	$500,000	4/13/89	Foreclosed	N/A	YES			1.47	0.90	0.64	1.04
97	Bonetto Realty	$1,300,000	6/29/89	In Bankruptcy	$308,642			YES	1.25	1.07	0.72	0.86
98	Cavaliero Realty	$1,400,000	6/29/89	In Bankruptcy	$327,206			YES	1.17	0.99	0.71	0.86
99	Verdin Realty	$1,300,000	6/29/89	In Bankruptcy	$287,776			YES	1.17	1.00	0.72	0.85
100	Adar Two Realty	$8,300,000	8/28/89	In Foreclosure	$1,676,263	YES	YES		1.12	0.89	0.77	0.97
		$63,985,000 [30 LOANS]			$10,224,883 [20 LOANS]	27 LOANS	9 LOANS	7 LOANS	1.16 AVERAGE	0.72 AVERAGE	0.73 AVERAGE	1.26 AVERAGE

APPENDIX A
Page 2

¶	Loan	Loan Amount	Percent Over/Understatement			Property Value:			Loan Amount:			
			Rent Roll	Expenses	Net Operating Income	Represented	Actual	Percent Overstatement	Actual	Maximum Acceptable	Excess Amount	Actual/ Acceptable
71	100 Realty Company	$485,000	176%	N/A	328%	$850,000	$260,000	327%	$485,000	$170,000	$315,000	285%
72	212 E 13th St	$475,000	137%	81%	236%	$700,000	$300,000	233%	$475,000	$210,000	$265,000	226%
73	455 West 34th St.	$4,000,000	128%	N/A	162%	$5,000,000	$3,080,000	162%	$4,000,000	$2,460,000	$1,540,000	163%
74	4395 Broadway Owners	$1,500,000	159%	N/A	207%	$2,000,000	$970,000	206%	$1,500,000	$730,000	$770,000	205%
75	625 Marlborough	$725,000	120%	N/A	133%	$1,100,000	$830,000	133%	$725,000	$560,000	$165,000	129%
76	43-25 43rd Owners	$1,500,000	147%	N/A	221%	$2,000,000	$910,000	220%	$1,500,000	$680,000	$820,000	221%
77	Ditmas	$1,100,000	148%	N/A	219%	$1,450,000	$660,000	220%	$1,100,000	$500,000	$600,000	220%
78	New Heights (173-174)	$4,000,000	120%	N/A	144%	$5,350,000	$3,710,000	144%	$4,000,000	$2,770,000	$1,230,000	144%
79	505 Realty	$1,050,000	111%	N/A	119%	$1,450,000	$1,200,000	121%	$1,050,000	$870,000	$180,000	121%
80	Prospect Realty	$1,600,000	121%	N/A	144%	$2,050,000	$1,420,000	144%	$1,600,000	$1,110,000	$490,000	144%
81	N.H. 765 Riverside	$2,800,000	119%	76%	187%	$3,800,000	$2,040,000	186%	$2,800,000	$1,500,000	$1,300,000	187%
82	1691 Eastburn Realty	$700,000	117%	N/A	129%	$1,000,000	$780,000	128%	$700,000	$550,000	$150,000	127%
83	4315-4333 46th St Apt	$3,500,000	149%	N/A	211%	$4,500,000	$2,130,000	211%	$3,500,000	$1,660,000	$1,840,000	211%

APPENDIX A
Page 2

¶	Loan	Loan Amount	Percent Over/Understatement			Property Value:			Loan Amount:			
			Rent Roll	Expenses	Net Operating Income	Represented	Actual	Percent Overstatement	Actual	Maximum Acceptable	Excess Amount	Actual/ Acceptable
84	Flatbush Avenue Realty	$8,000,000	128%	N/A	153%	$10,500,000	$6,860,000	153%	$8,000,000	$5,230,000	$2,770,000	153%
85	730 Realty	$1,550,000	119%	N/A	139%	$2,000,000	$1,440,000	139%	$1,550,000	$770,000	$780,000	201%
86	740 Realty	$1,550,000	122%	N/A	146%	$2,000,000	$1,370,000	146%	$1,550,000	$710,000	$840,000	218%
87	1261 Central Avenue	$2,500,000	120%	N/A	149%	$7,000,000	$4,700,000	149%	$2,500,000	$0	$2,500,000	N/A
88	2608 Realty Associates	$1,100,000	128%	100%	167%	$1,475,000	$880,000	168%	$1,100,000	$660,000	$440,000	167%
89	36 Plaza Street	$2,700,000	135%	N/A	175%	$3,500,000	$2,000,000	175%	$2,700,000	$1,540,000	$1,160,000	175%
90	1958 Realty	$1,000,000	131%	N/A	167%	$1,300,000	$780,000	167%	$1,000,000	$600,000	$400,000	167%
91	2344 Davidson	$1,500,000	115%	N/A	128%	$2,000,000	$1,570,000	127%	$1,500,000	$1,180,000	$320,000	127%
92	43-01 46th Street Owners	$1,400,000	160%	N/A	273%	$2,000,000	$730,000	274%	$1,400,000	$510,000	$890,000	275%
93	Brookhaven Realty	$1,450,000	122%	N/A	158%	$2,000,000	$1,270,000	157%	$1,450,000	$920,000	$530,000	158%

APPENDIX A
Page 2

¶	Loan	Loan Amount	Percent Over/Understatement: Rent Roll	Expenses	Net Operating Income	Property Value: Represented	Actual	Percent Overstatement	Loan Amount: Actual	Maximum Acceptable	Excess Amount	Actual/ Acceptable
94	350 Sterling Associates	$2,300,000	120%	N/A	139%	$2,900,000	$2,080,000	139%	$2,300,000	$1,650,000	$650,000	139%
95	N.H. Crown Equities	$2,700,000	128%	N/A	154%	$3,750,000	$2,430,000	154%	$2,700,000	$1,350,000	$1,350,000	200%
96	273 Realty Associates	$500,000	134%	N/A	164%	$780,000	$480,000	163%	$500,000	$340,000	$160,000	147%
97	Bonetto Realty	$1,300,000	N/A	N/A	N/A	N/A	N/A	N/A	$1,300,000	$1,050,000	$250,000	124%
98	Cavaliero Realty	$1,400,000	N/A	N/A	N/A	N/A	N/A	N/A	$1,400,000	$1,100,000	$300,000	127%
99	Verdin Realty	$1,300,000	N/A	N/A	N/A	N/A	N/A	N/A	$1,300,000	$1,050,000	$250,000	124%
100	Adar Two Realty	$8,300,000	114%	N/A	125%	$10,770,000	$8,600,000	125%	$8,300,000	$6,630,000	$1,670,000	125%
		$63,985,000 [30 LOANS]	131% AVERAGE	86% AVERAGE	173% AVERAGE	$83,225,000 [27 LOANS]	$53,480,000 [27 LOANS]	156%	$63,985,000	$39,060,000	$24,925,000	164%

APPENDIX A
Page 3

¶	Loan	Loan Amount	Outstanding Balance	Current Property Value	Market Loss	Fraud Loss		Total Fraud Loss	Fraud Loss/ Loan Amount
						On Loan	On Reserves/ Write Downs		
71	100 Realty Company	$485,000	$551,203	$400,000	$0	$151,203	$40,320	$191,523	39%
72	212 E 13th St.	$475,000	N/A	N/A	$0	$81,347	$159,440	$240,787	51%
73	455 West 34th St	$4,000,000	$4,871,859	$3,000,000	$0	$1,871,859	$413,760	$2,285,619	57%
74	4395 Broadway Owners	$1,500,000	N/A	N/A	$0	$518,986	$461,065	$980,051	65%
75	625 Marlborough	$725,000	N/A	N/A	$33,972	$57,475	$179,236	$236,711	33%
76	43-25 43rd Owners	$1,500,000	N/A	N/A	$0	$528,522	$705,602	$1,234,124	82%
77	Ditmas	$1,100,000	N/A	N/A	$0	$95,460	$187,102	$282,562	26%
78	New Heights (173-174)	$4,000,000	$4,976,761	$3,700,000	$0	$1,276,761	$199,526	$1,476,287	37%
79	505 Realty	$1,050,000	$1,261,543	$1,000,000	$0	$261,543	$38,400	$299,943	29%
80	Prospect Realty	$1,600,000	$1,768,833	$1,271,000	$0	$497,833	$135,814	$633,647	40%
81	N.H. 765 Riverside	$2,800,000	$3,357,410	$1,700,000	$0	$1,657,410	$598,700	$2,256,110	81%
82	1691 Eastburn Realty	$700,000	$831,635	$650,000	$0	$181,635	$89,760	$271,395	39%

APPENDIX A
Page 3

¶	Loan	Loan Amount	Outstanding Balance	Current Property Value	Market Loss	Fraud Loss		Total Fraud Loss	Fraud Loss/ Loan Amount
						On Loan	On Reserves/ Write Downs		
83	4315-3333 46th St Apt	$3,500,000	N/A	N/A	$0	$394,301	$772,830	$1,167,131	33%
84	Flatbush Avenue Realty	$8,000,000	N/A	N/A	$46,183	$621,769	$1,513,307	$2,135,076	27%
85	730 Realty	$1,550,000	$2,027,954	$1,560,000	$0	$467,954	$35,040	$502,994	32%
86	740 Realty	$1,550,000	$1,982,507	$1,570,000	$0	$412,507	$24,000	$436,507	28%
87	1261 Central Avenue	$2,500,000	$2,846,732	$1,525,000	$0	$1,321,732	$405,120	$1,726,852	69%
88	2608 Realty Associates	$1,100,000	$1,426,505	$810,000	$0	$616,505	$218,672	$835,177	76%
89	36 Plaza Street	$2,700,000	$3,002,285	$2,100,000	$0	$902,285	$295,200	$1,197,485	44%
90	1958 Realty	$1,000,000	$1,244,977	$500,000	$93,729	$651,248	$206,530	$857,777	86%
91	2344 Davidson	$1,500,000	N/A	N/A	$0	$1,072,639	$2,102,372	$3,175,011	212%
92	43-01 46th Street Owners	$1,400,000	N/A	N/A	$0	$383,147	$661,814	$1,044,961	75%
93	Brookhaven Realty	$1,450,000	$1,638,786	$1,400,000	$0	$238,786	$98,880	$337,666	23%
94	350 Sterling Associates	$2,300,000	$2,655,010	$1,785,000	$0	$870,010	$251,040	$1,121,050	49%

APPENDIX A
Page 3

¶	Loan	Loan Amount	Outstanding Balance	Current Property Value	Market Loss	Fraud Loss On Loan	Fraud Loss On Reserves/ Write Downs	Total Fraud Loss	Fraud Loss/ Loan Amount
95	N.H. Crown Equities	$2,700,000	$3,329,276	$1,767,000	$0	$1,562,276	$503,840	$2,066,116	77%
96	273 Realty Associates	$500,000	N/A	N/A	$0	$355,198	$696,188	$1,051,386	210%
97	Bonetto Realty	$1,300,000	$1,494,165	$1,400,000	$0	$94,165	$77,532	$171,697	13%
98	Cavaliero Realty	$1,400,000	$1,569,207	$1,600,000	$0	$0	$83,585	$83,585	6%
99	Verdin Realty	$1,300,000	$1,455,865	$1,250,000	$0	$205,865	$97,228	$303,093	23%
100	Adar Two Realty	$8,300,000	$9,783,304	$5,500,000	$1,091,618	$3,191,686	$1,098,903	$4,290,590	52%
		$63,985,000 [30 LOANS]	$52,075,817 [20 LOANS]	$34,488,000 [20 LOANS]	$1,265,502 [30 LOANS]	$20,542,107 [30 LOANS]	$12,350,806 [30 LOANS]	$32,892,912 [30 LOANS]	51%

APPENDIX B

Schedule of Correspondence Supporting FNB's Mail Fraud Allegations

DATE	FROM	TO	DOCUMENT/ENCLOSURE
1. 100 REALTY LOAN			
12/06/85	Gelt on behalf of 100 Realty Co. Herzka, Ralph	FNB	Executed Commitment Letter
12/10/85	Gelt	Esther Shur	Gelt Commitment Letter
2. 212 EAST 13TH ASSOCIATES			
02/05/86	Gelt Herzka, Ralph	FNB	Gelt Commitment Letter
03/04/86	Gelt Herzka, Ralph	FNB	Letter re: Refinance
03/05/86	Gelt Herzka, Ralph	Jeffrey Braun	Gelt Commitment Letter

DATE	FROM	TO	DOCUMENT/ENCLOSURE
3.	**455 WEST 34TH STREET ASSOCIATES**		
12/04/86	Gelt on behalf of 455 West 34th Street Associates Herzka, Ralph	FNB	Executed Commitment Letter
12/08/86	Gelt Malek, David	455 West 34th Street Associates	Gelt Commitment Letter
4.	**4395 BROADWAY OWNERS CORP.**		
04/06/87	Gelt Herzka, Ralph	4395 Broadway Owners Corp. Twerski, Labe	Gelt Commitment Letter
5.	**625 MARLBOROUGH ASSOCIATES**		
07/21/87	Gelt on behalf of 625 Marlborough Associates Herzka, Ralph	FNB	Executed Commitment Letter
07/10/87	Gelt Herzka, Ralph	625 Marlborough Associates	Gelt Commitment Letter

DATE	FROM	TO	DOCUMENT/ENCLOSURE
6.	**43-25 43rd OWNERS CORP.**		
08/18/87	Gelt on behalf of 43-25 43rd Owners Corp. Twerski, Labe	FNB	Executed Commitment Letter
7.	**DITMAS GARDENS ASSOCIATES**		
07/30/87	Gelt on behalf of Ditmas Gardens Associates Braun, Jeffrey	FNB	Executed Commitment Letter
08/19/87	Gelt Herzka, Ralph	FNB	Proposed Modifications to Commitment Letter
8.	**NEW HEIGHTS 173-174 LIMITED PARTNERSHIP**		
10/27/87	Gelt on behalf of New Heights (173-174) L.P. (illegible)	FNB	Executed Commitment Letter

DATE	FROM	TO	DOCUMENT/ENCLOSURE
9. 505 REALTY ASSOCIATES			
11/30/87	Gelt Herzka, Ralph	FNB	Legal Description of Property
No date	Gelt Herzka, Ralph	FNB	Re: points on the loan
No date	Gelt Herzka, Ralph	FNB	Re: satisfaction of judgment against Shimon Eckstein
12/22/87	Gelt on behalf of 505 Realty Associates Eckstein, Shimon	FNB	Executed Commitment Letter
10. PROSPECT REALTY ASSOCIATES			
Unknown	Gelt Herzka, Ralph	FNB	Re: Interest Rate Change
11/30/87	Gelt Herzka, Ralph	FNB	Re: Legal Descriptions

DATE	FROM	TO	DOCUMENT/ENCLOSURE
12/22/87	Gelt on behalf of Prospect Realty Associates Wolf, Juda	FNB	Executed Commitment Letter
11.	**NEW HEIGHTS (765) RIVERSIDE LIMITED PARTNERSHIP**		
12/21/87	Gelt on behalf of New Heights (765) Riverside L.P. Moss, Michael	FNB	Executed Commitment Letter
12.	**1691 EASTBURN REALTY CO.**		
07/07/88	Gelt on behalf of 1691 Eastburn Realty Co. Gross, Sol	FNB	Executed Commitment Letter
13.	**4315-4333 46TH STREET APTS. CORP.**		
12/29/87	Gelt on behalf of 4315-4333 46th St. Apts Corp. Twerski, Labe	FNB	Executed Commitment Letter

DATE	FROM	TO	DOCUMENT/ENCLOSURE
01/11/88	Gelt Herzka, Ralph	FNB	Re: transfer to coop, and paying 1/2% at closing
14. FLATBUSH AVENUE REALTY ASSOCIATES			
01/26/88	Gelt Herzka, Ralph	James G. Peel Associates	Appraisal Request
15. 730 GRAND CONCOURSE			
Unknown	Gelt Herzka, Ralph	FNB	Re: mortgage amount and interest rate
04/29/88	Gelt on behalf of 730 Realty Associates Malek, David	FNB	Executed Commitment Letter
16. 740 REALTY ASSOCIATES			
Unknown	Gelt Herzka, Ralph	FNB	Re: mortgage amount, interest rate and due on sale clause

DATE	FROM	TO	DOCUMENT/ENCLOSURE
17. 1261 CENTRAL AVENUE OWNERS CORP.			
03/31/88	Gelt Herzka, Ralph	FNB	Re: loan terms
04/20/88	Gelt Herzka, Ralph	FNB	Re: points
05/03/88	Gelt Herzka, Ralph	FNB	Re: no pre-payment penalty
05/17/88	Gelt	FNB	Re: Loan Application and financial statements for E. Shur & E. Cohen
18. 2608 REALTY LOAN			
Unknown	Gelt Weinberg, Jeffrey	FNB	Re: Set-Up, Rent Roll, Contract, Lock-In
Unknown	Gelt Weinberg, Jeffrey	FNB	Re: Lock-In Rate

DATE	FROM	TO	DOCUMENT/ENCLOSURE
08/10/88	Gelt on behalf of 2608 Realty Associates Werdiger, Solomon	FNB	Executed Commitment Letter
08/12/88	Gelt Herzka, Ralph	FNB	Re: Appraisal Fee
08/17/88	Gelt Herzka, Ralph	FNB	Re: Asbestos Report
08/22/88	Gelt Herzka, Ralph	FNB	Re: Tax Returns
08/23/88	Gelt Herzka, Ralph	FNB	Re: Commitment
08/26/88	Gelt Herzka, Ralph	FNB	Re: Work Orders
01/10/89	Gelt Platschek, Goldie	FNB	Re: Escrow
01/16/89	Gelt Horowitz, Linda	FNB	Re: Business Certificate for Partners

DATE	FROM	TO	DOCUMENT/ENCLOSURE
02/13/90	Gelt Horowitz, Linda	FNB	Re: Escrow Agreement
19. 36 PLAZA STREET OWNERS CORP.			
08/09/88	Gelt Herzka, Ralph	FNB	Re: Loan amount, interest rate, and amortization schedule
08/12/88	Gelt Horowitz, Linda	FNB	Check for appraisal fee
08/19/88	Gelt on behalf of 36 Plaza St. Owners Corp. (Cohen, Elaine) for Herzka, Ralph	FNB	Executed Commitment Letter
08/25/88	Gelt Herzka, Ralph	FNB	Assignment of contract of sale, and asbestos report
20. 1958 REALTY ASSOCIATES			
06/10/88	Gelt Horowitz, Linda	FNB	Rent roll; Set-up; and purchase contract
08/12/88	Gelt Horowitz, Linda	FNB	Check for appraisal fee

DATE	FROM	TO	DOCUMENT/ENCLOSURE
09/20/88	Gelt on behalf of 1958 Realty Associates (illegible)	FNB	Executed Commitment Letter
09/29/88	Gelt Horowitz, Linda	FNB	Check for commitment fee
01/06/89	Gelt Horowitz, Linda	FNB	Asbestos report
21. 2344 DAVIDSON ASSOCIATES			
06/29/88	Gelt Weinberg, Jeffrey	FNB	Income and expense statement; rent roll; and purchase contract
09/29/88	Gelt on behalf of 2344 Davidson Associates Malek, David	FNB	Executed Commitment Letter
10/11/88	Gelt Horowitz, Linda	FNB	Asbestos report
22. 43-01 46TH STREET OWNERS CORP.			
08/11/88	Gelt	FNB	Re: interest rate

DATE	FROM	TO	DOCUMENT/ENCLOSURE
08/11/88	Gelt Weinberg, Jeffrey	FNB	Rent roll; and contract of sale
09/19/88	Gelt Herzka, Ralph	FNB	Re: closing date, loan amount, amortization period and provision of guarantee.
9/28/88	Gelt Platschek, Goldie	FNB	Title report
09/28/88	Gelt on behalf of 43-01 46th Street Twerski, Labe	FNB	Executed Commitment Letter
10/11/88	Gelt on behalf of 43-01 46th St. Owners Corp. Horowitz, Linda	FNB	Executed Commitment Letter
10/17/88	Gelt Horowitz, Linda	FNB	Asbestos report

DATE	FROM	TO	DOCUMENT/ENCLOSURE
23. 350 STERLING ASSOCIATES			
09/16/88	Gelt Weinberg, Jeffrey	FNB	Rent roll; purchase contract; and summary of property and borrower information
10/31/88	Gelt Herzka, Ralph	FNB	Loan application; financial statements, and tax returns
11/11/88	Gelt on behalf of 350 Sterling Associates	FNB	Executed Commitment Letter
11/17/88	Law Offices of Allen I. Gross Stein, Aaron	Gelt	Re: no partnership agreement for borrower
11/17/88	Gelt Horowitz, Linda	FNB	Business Certificate
24. CROWN EQUITIES			
12/19/88	Gelt Platschek, Goldie	FNB	Re: survey reading and survey print
12/12/88	Gelt Platschek, Goldie	FNB	Re: title report

DATE	FROM	TO	DOCUMENT/ENCLOSURE
12/12/88	Gelt Horowitz, Linda	FNB	Enclosing commitment fee, signed FNB commitment letter, and asbestos report
12/5/88	Gelt Horowitz, Linda	FNB	Enclosing borrower certifications and letter re judgment against M. Moss
11/25/88	Gelt Horowitz, Linda	FNB	Re: tax returns
10/10/88	Gelt Horowitz, Linda	FNB	Enclosing check for appraisal fee
25. BROOKHAVEN REALTY			
09/23/88	Gelt Weinberg, Jeffrey	FNB	Re: Set-Up, Rent Roll, Contract of Sale, etc.
11/21/88	Gelt Horowitz, Linda	FNB	Re: Asbestos Report

DATE	FROM	TO	DOCUMENT/ENCLOSURE
26. 273 REALTY ASSOCIATES			
02/22/89	Gelt on behalf of 273 Realty Associates Halberstam, Mordechai	FNB	Executed Commitment Letter
27. BONETTO REALTY			
2/17/89	Gelt Herzka, Ralph	FNB	Re: income and expense statement, rent roll, sales contract and check for appraisal fee
5/2/89	Gelt Herzka, Ralph	FNB	Re: incorporation of borrower
5/4/89	Gelt Herzka, Ralph	FNB	Re: loan application, financial statements, certifications, tax returns and real property analysis
6/22/89	Gelt Horowitz, Linda	FNB	Enclosing Assignment to Contract of Sale

DATE	FROM	TO	DOCUMENT/ENCLOSURE
28. CAVALIERO REALTY			
5/15/89	Gelt Herzka, Ralph	FNB	Re: transfer of property to corporate borrower
5/2/89	Gelt Herzka, Ralph	FNB	Re: title holder of property
5/2/89	Gelt Herzka, Ralph	FNB	Re: loan number assigned to loan
29. VERDIN REALTY			
5/17/89	Gelt Horowitz, Linda	FNB	Re: satisfaction of judgments
5/15/89	Gelt Herzka, Ralph	FNB	Re: transfer of property to corporate borrower
5/2/89	Gelt Herzka, Ralph	FNB	Re: title holder on property

DATE	FROM	TO	DOCUMENT/ENCLOSURE
5/2/89	Gelt Herzka, Ralph	FNB	Re: loan number assigned to loan
2/17/89	Gelt Herzka, Ralph	FNB	Re: income and expense statement, rent roll, sales contract and check for appraisal fee

30. ADAR TWO REALTY ASSOCIATES

05/04/89	Gelt Herzka, Ralph	FNB	Income & expense information; and itemized rent roll
07/27/89	Gelt Birnbaum, Aaron	FNB	Borrower information
07/28/89	Gelt Birnbaum, Aaron	FNB	Loan application; personal financial statements for borrowers
08/23/89	Gelt for Adar Two Realty Associates (Herzka, Ralph) for Friedman, Joseph	FNB	Executed Commitment Letter (Amended)

EXHIBIT 5

Title 18, United States Code, Section 1344

§ 1344. Bank fraud

Whoever knowingly executes, or attempts to execute, a scheme or artifice—

(1) to defraud a financial institution; or

(2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises;

shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

Title 18, United States Code, Section 1961(1)

§ 1961. Definitions

As used in this chapter—

(1) "racketeering activity" means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1029 (relating to fraud and related activity in connection with access devices), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail

fraud), section 1343 (relating to wire fraud), section 1344 (relating to financial institution fraud), sections 1461-1465 (relating to obscene matter), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1512 (relating to tampering with a witness, victim, or an informant), section 1513 (relating to retaliating against a witness, victim, or an informant), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), section 1956 (relating to the laundering of monetary instruments), section 1957 (relating to engaging in monetary transactions in property derived from specified unlawful activity), section 1958 (relating to use of interstate commerce facilities in the commission of murder-for-hire), sections 2312 and 2313 (relating to interstate transportation of stolen motor vehicles), sections 2314 and 2315 (relating to interstate transportation of stolen property), section 2321 (relating to trafficking in certain motor vehicles or motor vehicle parts), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), (D) any offense involving fraud connected with a case under title 11, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States,

or (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act;

Title 18, United States Code, Section 1964(c)

§ 1964. Civil remedies

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

DATE	FROM	TO	DOCUMENT/ENCLOSURE
08/24/89	Gelt on behalf of Adar Two Realty Associates (Herzka, Ralph) for Friedman, Joseph	FNB	Executed Commitment Letter
11/03/89	Gelt Horowitz, Linda	FNB	Re: no written partnership agreement for borrower

(2)

Supreme Court, U.S.
FILED
NOV 22 1994
OFFICE OF THE CLERK

No. 94-763

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

FIRST NATIONWIDE BANK, a Federal Savings Bank, a Federal Stock Association,

Petitioner,

v.

GELT FUNDING CORP., *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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16 pp

LIST OF PARTIES AND CORPORATIONS

The caption to the Petition for a Writ of Certiorari lists all the parties to the proceeding.

Pursuant to Rule 29.1, Respondent Gelt Funding Corp. states that it has no parents or subsidiaries.

TABLE OF CONTENTS

Page

LIST OF PARTIES AND CORPORATIONS i

TABLE OF AUTHORITIES iii

COUNTERSTATEMENT OF THE CASE 2

ARGUMENT 4

I THE SECOND CIRCUIT'S INJURY AND CAUSATION ANALYSES ARE BASED ON WELL ESTABLISHED PRINCIPLES 4

A. The Complaint Failed To Allege Actual Present Injury 5

B. The Alleged Fraud Did Not Proximately Cause the Bank's Injury . . . 7

II THE DECISION BELOW DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT 8

CONCLUSION 10

TABLE OF AUTHORITIES

Page(s)

CASES:

Bankers Trust Co. v. Rhoades, 859 F.2d 1096 (2d Cir. 1988), *cert. denied*, 490 U.S. 1007 (1989) 6

Bastian v. Petren Resources Corp., 892 F.2d 680 (7th Cir.), *cert. denied*, 496 U.S. 906 (1990) 7

Brandenburg v. Seidel, 859 F.2d 1179 (4th Cir. 1988) 7

Citibank, N.A. v. K-H Corp., 968 F.2d 1489 (2d Cir. 1992) 7

Disher v. Information Resources, Inc., 691 F. Supp. 75 (N.D. Ill. 1988), *aff'd*, 873 F.2d 136 (7th Cir. 1989) 5

Federal Deposit Ins. Corp. v. W.R. Grace & Co., 877 F.2d 614 (7th Cir. 1989), *cert. denied*, 494 U.S. 1056 (1990) 5

Greycas, Inc. v. Proud, 826 F.2d 1560 (7th Cir. 1987), *cert. denied*, 484 U.S. 1043 (1988) 6

Hermes v. Title Guarantee & Trust Co., 282 N.Y. 88, 24 N.E.2d 859 (1939) 5

TABLE OF AUTHORITIES (Cont'd)

Page(s)

CASES:

Holmes v. Securities Investor Protection Corp., 112 S. Ct. 1311 (1992) 7

Sager v. Friedman, 270 N.Y. 472, 1 N.E. 2d 971 (1936) 5, 6

Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479 (1985) 8, 9

Stochastic Decisions, Inc. v. DiDomenico, 995 F.2d 1158 (2d Cir.), *cert. denied*, 114 S. Ct. 385 (1993) 6

STATUTES:

18 U.S.C. § 1961 2

18 U.S.C. § 1964 2

No. 94-763

IN THE
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October Term, 1994

FIRST NATIONWIDE BANK, a Federal Savings Bank,
a Federal Stock Association, *Petitioner*,

v.

GELT FUNDING CORP., *et al.*, *Respondents.*

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Second Circuit

BRIEF FOR THE RESPONDENTS IN OPPOSITION

A San Francisco bank (wholly owned by Ford Motor Co.) embarked in 1985 on an ambitious lending spree to individual purchasers of New York City rental properties. After the New York real estate market collapsed in 1990, the Bank sought damages through a federal RICO action against a small mortgage brokerage firm and various real estate investors. The district court determined twice that the Bank's complaint failed to state a claim. The court of appeals unanimously affirmed. The decision below turns on the specific facts of this case and decides no novel principles of law. The petition for a writ of certiorari should be denied.

COUNTERSTATEMENT OF THE CASE

In 1985, First Nationwide Bank ("the Bank") was bought by Ford Motor Co. and launched an ambitious expansion of its lending activities in New York City (Pet. App. A-4). From 1985 to 1990, the Bank invested more than $1.3 billion in the New York real estate market by making loans to private purchasers of rental properties (*id.*). All these loans were "non-recourse" — *i.e.*, the Bank, bullish on the future prospects of the New York market, limited its recourse in case of default to the underlying properties (Pet. App. A-5). Borrowers served by Gelt Funding Corp. ("Gelt"), a mortgage broker, accounted for approximately 70 percent of the Bank's New York commercial loans (Pet. App. A-4). By 1990, the New York real estate market had collapsed, and the Bank shut down all commercial lending in New York (*id.*).

The Bank alleges that during an audit in 1991 it "discovered" that a higher proportion of Gelt loans than other loans were in default (Pet. App. A-5). Based largely on that "discovery," the Bank initiated this action under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961, 1964, purportedly to redress fraud perpetrated by the respondents. [1]

The Bank filed its initial complaint in January 1992. It was dismissed on November 30, 1992, because the Bank failed to allege that it had incurred any present injury (few of the loans, in fact, were alleged to be in default) or that its injury, if any, was caused by respondents' alleged

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[1] The Bank also has filed a lawsuit in state court in New York, in which it is pursuing claims based on the same allegations contained in its federal complaint.

misstatements. The district court granted leave to amend, and the Bank then filed a 174-page complaint containing (i) a complex "methodology" for determining the values of the properties when the loans were made and (ii) equally complicated and novel theories of injury and causation.

In its amended complaint, the Bank theorized that respondents should be liable for the "additional risk" the Bank assumed when it loaned more money than it would have loaned but for the alleged misstatements. The Bank argued that it was irrelevant whether it foreclosed on the properties or even had other creditor remedies because "[f]or all practical purposes, the . . . additional funds were lost the moment the loans were made" and are "recoverable even if the borrower repaid the loan in full with interest" (Pet. App. A-8, A-9). The Bank also alleged that respondents are liable for reserves it took against projected losses on the Gelt loans, which diminished the Bank's capital and drained its "life's blood" (Pet. App. A-7).

The district court rejected the injury theory alleged in the amended complaint. The court held that the Bank had not satisfied the axiomatic rule that a plaintiff has standing only if there is actual present injury, not speculative injury that might occur in the future (Pet. App. C-6). The court also criticized, as a "prescription for ceaseless litigation" (Pet. App. C-7), the Bank's "novel" theory that "a claimant could recover under RICO for 'additional risk' it unknowingly assumed on a loan, even if the loan was repaid" (*id.*).

A unanimous panel of the Second Circuit affirmed. It concluded that the actual damages, if any, that might be incurred by the Bank were yet to be determined and were based on little more than guesswork (Pet. App. A-10). The

panel also held that the amended complaint suffered from the "equally fundamental defect" of not adequately alleging proximate cause. Among other things, respondents made payments for years on each of the loans in the amended complaint, and not a single loan went into default before the market collapsed in 1990. While the Bank's valuation "methodology" tried to brush aside the market's collapse as mere "concidence," the court of appeals concluded that "[t]he methodology employed by [the Bank] in determining the magnitude of the defendants' alleged [misstatements] is so defective, and the conclusions reached so defy logic that no 'reasonable inferences' [of proximate cause] can be drawn therefrom" (Pet. App. A-17). In short, "FNB's claims fail because it has not adequately pled facts which, if proven, would show that its loss was caused by the alleged misstatements as opposed to intervening events" (Pet. App. A-19).

ARGUMENT

I

THE SECOND CIRCUIT'S INJURY AND CAUSATION ANALYSES ARE BASED ON WELL ESTABLISHED PRINCIPLES

The Second Circuit's ripeness and proximate-cause determinations are consistent with principles announced by this Court, with other Second Circuit precedents, and with the law in every other Circuit.

A. The Complaint Failed To Allege Actual Present Injury.

The Bank argues in its petition for certiorari, as it did below, that even if it ultimately is repaid the full amount of its loans with interest, it suffered fraud losses on the day the loans were made — and must be paid treble "damages" and attorneys' fees — in the amount of the difference between what the Bank actually loaned and the amount it would have loaned had the Bank known of the alleged misrepresentations. This is an untenable argument.

The Second Circuit invoked a general rule of fraud damages applicable to lenders who claim that security has been fraudulently overvalued: "Because the fraud defendant is not liable for all losses that may occur, but only for those actually suffered, only after the lender has exhausted the bargained-for remedies available to it can the lender assert that it was damaged by the fraud, and then only to the extent of the deficiency" (Pet. App. A-9). This established principle is supported by ample precedent. *E.g., Disher v. Information Resources, Inc.*, 691 F. Supp. 75, 79 (N.D. Ill. 1988), *aff'd*, 873 F.2d 136 (7th Cir. 1989); *Hermes v. Title Guarantee & Trust Co.*, 282 N.Y. 88, 93, 24 N.E.2d 859, 861 (1939); *Sager v. Friedman*, 270 N.Y. 472, 480-81, 1 N.E.2d 971, 973-74 (1936).

The Bank's theory conflicts with the fundamental principle that "to the extent the plaintiffs received the return actually bargained for, they had suffered no compensable RICO injury" (Pet. App. A-11). The courts below correctly rejected the Bank's liability theory as a "prescription for ceaseless litigation" by lenders, investors, and others who, despite receiving everything they bargained for, assert under RICO and other fraud theories that they would have

bargained a better deal but for misstatements by their co-parties (Pet. App. C-7).

There is no conflict between the decision below and the Seventh Circuit's decision in *Federal Deposit Ins. Corp. v. W.R. Grace & Co.*, 877 F.2d 614 (7th Cir. 1989), *cert. denied*, 494 U.S. 1056 (1990). *W.R. Grace Co.*, which did not involve RICO claims, concerned an unsecured loan that was repayable solely out of revenue generated from three gas fields. When the bank learned that the fields contained no gas, the loans became totally worthless. It was, therefore, incontestable that the bank had lost the amount of its loan. Similarly, in *Greycas, Inc. v. Proud*, 826 F.2d 1560 (7th Cir. 1987), *cert. denied*, 484 U.S. 1043 (1988), the plaintiff sued *after* the collateral had been sold and the fact and extent of its injury had been established. And in *Sager v. Friedman*, 270 N.Y. 472, 481, 1 N.E.2d 971, 974 (1936), the court held that amounts paid on the debt reduced the amount the plaintiff could claim as fraud damages.

The Second Circuit's ripeness analysis also follows earlier rulings of that court. *E.g., Stochastic Decisions, Inc. v. DiDomenico*, 995 F.2d 1158, 1166 (2d Cir.), *cert. denied*, 114 S. Ct. 385 (1993); *Bankers Trust Co. v. Rhoades*, 859 F.2d 1096, 1106 (2d Cir. 1988), *cert. denied*, 490 U.S. 1007 (1989).

In *Stochastic Decisions*, the Second Circuit held that a plaintiff's damages were not ripe because there were ongoing efforts on the plaintiff's part to collect judgments (995 F.2d at 1165). And in *Bankers Trust*, the court held that a bank's injury was contingent upon default and a subsequent sale of collateral. *Bankers Trust* and *Stochastic* have been relied upon repeatedly by courts in other Circuits,

and the petitioner does not cite in this Court any authority disagreeing with the holdings in those cases.

B. The Alleged Fraud Did Not Proximately Cause the Bank's Injury.

The Second Circuit analyzed the Bank's proximate-cause allegations under the well-settled rule that a RICO plaintiff must allege "that the defendant's violations were a proximate cause of the plaintiff's injury, *i.e.*, that there was a direct relationship between the plaintiff's injury and the defendant's injurious conduct." *See* Pet. App. A-11 (quoting *Standardbred Owners Ass'n v. Roosevelt Raceway Assocs.*, 985 F.2d 102, 104 (2d Cir. 1993)). This requires a showing not only that the defendant's alleged RICO violation was a "but for" cause, but also that the violation was the proximate cause of the alleged harm. *See Holmes v. Securities Investor Protection Corp.*, 112 S. Ct. 1311 (1992). To satisfy proximate or loss causation, the Circuits agree that it is not enough for a RICO plaintiff to allege that but for the misrepresented facts it would not have entered into the transaction. A RICO plaintiff also must allege that the misrepresented facts were the proximate cause "of the transaction's turning out to be a losing one." *See, e.g.*, *Citibank, N.A. v. K-H Corp.*, 968 F.2d 1489, 1495 (2d Cir. 1992); *Bastian v. Petren Resources Corp.*, 892 F.2d 680, 684 (7th Cir.), *cert. denied*, 496 U.S. 906 (1990); *see also Brandenburg v. Seidel*, 859 F.2d 1179, 1190 (4th Cir. 1988). In *Bastian*, for example, the Seventh Circuit, in an opinion by Circuit Judge Posner, refused to allow plaintiffs to proceed on RICO and other fraud claims that would have recovered the difference between what they actually paid for oil and gas partnerships and what they would have paid had they known that the partnership promoters had violated the

securities laws. The court noted that there were other general economic conditions that caused the collapse of the oil and gas market.

Applying these basic rules, the Second Circuit correctly concluded that there was no adequate nexus here. The Bank alleged no facts tying the default on any loan to any of the respondents' alleged misrepresentations. Moreover, the amended complaint showed on its face that the first defaults on the loans occurred only following the crash of the New York City real estate market, several years after the alleged misrepresentations. "[T]he substantial period between the alleged fraud and FNB's loss, coupled with the concurrence of that loss with the real estate market crash, is additional support for the conclusion that the fraud was not a substantial cause of FNB's injury" (Pet. App. A-18).

II

THE DECISION BELOW DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT

The Bank erroneously asserts that the decision below conflicts with *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985). There is no conflict whatever.

In *Sedima*, this Court rejected a requirement that a RICO plaintiff show independent "racketeering injury." This case has nothing to do with racketeering injury. Far from conflicting with *Sedima*, the decision below actually is based on *Sedima's* instruction that a RICO plaintiff "only has standing if, and can only recover to the extent that, he has been injured in his business or property by the conduct

constituting the violation." Pet. App. A-10 (citing *Sedima*, 473 U.S. at 496).

Nor is there any truth to the Bank's assertion, "that the decision of the Second Circuit will make it virtually impossible for any mortgage lender ever to assert a viable RICO claim" (Pet. 12). As the decision's limiting language makes clear (*see* Pet. App. A-19), the only party affected by this decision is a mortgage lender who, like the Bank, sues in the aftermath of a real estate market collapse on a loan that went into default (i) years after the alleged misstatement, and (ii) coincident with the market's collapse. It forecloses a lawsuit only if the methodology for determining the magnitude of the borrower's misstatement "is so defective, and the conclusions reached so defy logic, that no 'reasonable inferences' [of proximate cause] can be drawn therefrom" (Pet. App. A-17). No court has understood otherwise. Indeed, in the two years since the district court published its first opinion dismissing the Bank's complaint, no court has relied on any of the decisions below to dismiss a RICO claim brought by a mortgage lender.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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November 1994